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BYTHEWOOD & JARMAN'S

CONVEYANCING.

FOURTH EDITION.

Vol. I.

ABSTRACTS—APPOINTMENTS.

BYTHEWOOD & JARMAN'S

SYSTEM OF CONVEYANCING.

A SELECTION OF

PRECEDENTS IN CONVEYANCING

TAKEN FROM MODERN MANUSCRIPT COLLECTIONS

AND DRAFTS OF ACTUAL PRACTICE

WITH

Dissertations and Practical Notes

BY THE LATE

W. M. BYTHEWOOD, THOMAS JARMAN & GEORGE SWEET,

BARRISTERS-AT-LAW.

Fourth Edition

BY

LEOPOLD GEORGE GORDON ROBBINS,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

VOL. I.

ABSTRACTS—APPOINTMENTS.

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PREFACE

TO THE FOURTH EDITION.

Mr. Bythewood, the original Author of this Work, lived only to produce about one-third of his undertaking. Mr. Jarman completed the Work, the first edition of which appeared in the years 1821 to 1834, in ten volumes; and he also brought out a second edition of the first seven volumes. This edition was never completed; for, in consequence of the great interval of time which elapsed between the publication of the earlier and of the later volumes, a third edition of the former was required; and, accordingly, in 1841, a new edition was undertaken by the late Mr. George Sweet, of the Inner Temple; which, though called the third, was, in fact, only the second edition, so far as concerned the last three volumes. That edition was completed in 1850, with the exception of the volume on Settlements, of which only the original edition has appeared up to the present time.

The labour involved in preparing a new edition of this Work, necessarily great, owing to the long lapse of time since the appearance of the last edition, has been greatly increased by the alterations in the law and practice of Conveyancing introduced by recent statutes —alterations the extent and application of which is very

difficult of appreciation, and is almost from day to day being defined or explained by judicial decision (*a*).

In the dissertations and notes to the Precedents, the present Editor has mainly adopted the method of arrangement, and, as far as possible, retained the very words of his predecessors; he has merely endeavoured to omit all such parts of their work as have now become obsolete; to confirm or modify, so far as necessary by reference to subsequent statutes and decided cases, propositions which they advanced; and to bring up their work to date, and adapt it to the requirements of members of the legal profession, by introducing in their appropriate places explanations of the alterations in, and additions to, the law and practice of Conveyancing as established by statute, or otherwise, in recent times. The practice of the former Editors has been followed of never paraphrasing statutory enactments; where occasion requires anything more than a mere reference to any statute, or, at most, such a reference as is sufficiently given by quoting the marginal note, the section under consideration will generally be found stated *verbatim;* and it is intended that every section of every statute directly bearing upon material points of Conveyancing practice shall be found in some one or other portion of this Work, at such place as shall seem most appropriate, with references thereto in other parts of the Work as occasion requires. The references to cases decided since 1865

(*a*) For instance, the proposition maintained at p. 418 of this Edition, with regard to notices by limited owners of settled lands of their intention to sell, has received judicial confirmation by Pearson, J., in the case of *Re Ray's Settled Estates* (25 Ch. D. 464), who decided "that the notice must be a notice of some particular sale or lease in contemplation at the time when the notice is given." References to this and other recent decisions will be found in the "*Addenda*."

are generally made very briefly, it having been assumed that the majority of practitioners into whose hands these volumes may come, have at hand, or have easy access to, copies of the "Law Reports." With regard to earlier cases, the reports of which are not so readily accessible, the principal facts, and the material portions of the judgments, are often stated at some length. It may be added that several long and elaborate notes have been retained, notwithstanding that they treat of points which, in our time, arise comparatively seldom in practice, inasmuch as they contain learned and lucid expositions, affording information, which may even now prove useful on occasion, and which is not readily to be obtained elsewhere.

Some of the Precedents in this volume are taken from MS. copies of drafts settled by the late Mr. John Young Kemp, of Lincoln's Inn, a conveyancer whose deep and accurate knowledge of law, rapid and firm grasp of fact, and neatness and clearness of expression, will not soon be forgotten, and a man whose genial and unaffected kindliness of character made all who knew him to love him. Several volumes of these copies were bequeathed by him to Mr. J. A. Tompson, of the Inner Temple, who has most kindly put them at my disposal. Other Precedents are taken from those to be found in former editions of this Work, with such omissions and alterations as appeared necessary, to adapt them to present requirements; and others, again, are taken from deeds and other documents in actual use, lent to me for the purpose. I now desire to express my grateful acknowledgments of the ready and liberal spirit of helpfulness with which members of both branches of the legal profession have furnished me with the materials necessary to the Work,

or rendered me counsel or assistance in arranging those materials, and to tender to them my best thanks. Particularly I would record my obligations to Mr. Ralph J. Thicknesse, of Lincoln's Inn, not only for his assistance in revising the sheets and compiling the Table of Statutes, but also for many valuable suggestions during the progress of the Work, and for his contribution of the greater part of the Dissertation on Acknowledgments by Married Women.

The present Edition is intended to be issued in a complete form compressed into six volumes, which will appear severally as each is ready. The alphabetical arrangement of subjects originally adopted has been maintained, but several new sets of forms will be introduced under appropriate heads, and the last volume will contain a collection of miscellaneous and additional instruments, being such as cannot conveniently be arranged under any particular head, or such as may appear to be rendered necessary by reason of impending changes in legislation.

In submitting this volume to the Profession, the present Editor begs the indulgence of its members, who can fully appreciate the labour and difficulty of the task he has undertaken; and he hopes that, notwithstanding any errors and shortcomings on his part, the Work may prove of service to practitioners of both branches, in advising on the construction of legal documents and matters connected therewith, and in framing and settling drafts, in accordance with modern principles and practice.

L. G. GORDON ROBBINS.

4, Stone Buildings, Lincoln's Inn,
29th March, 1884.

PREFACE

TO THE ORIGINAL EDITION.

In presenting the following Work to the Profession, it may appear unnecessary to state, that the greater part of the Precedents were drawn by Counsel of the greatest eminence, because the superior excellence of the generality of the Forms must be manifest to any person in the least acquainted with the subject;—the Precedents, the Variations, and the Notes added by myself, will, I hope, be received with candour. It would have given me pleasure to have inserted, in every instance, the name of the gentleman, by whom each instrument was drawn; but, as many of them are still living, it has been omitted altogether.

The great advantage of this Collection must be evident; because, with a very few exceptions of some short general Forms, the Precedents were drafts really drawn and used in the course of practice, and consequently may be regarded as the present method of Conveyancing.

I beg leave most respectfully to return my thanks to those Counsel and Solicitors, who have, with a liberality which peculiarly distinguishes Gentlemen of the Law, kindly and spontaneously lent me their extensive Manuscript Collections of Precedents and Drafts of Deeds.

The whole of this Work was originally intended to be published at once, and several heads of it have been for some time entirely perfected; but, in consequence of the determination to publish it in Parts, when little preparation had been made for those heads, which, under the present arrangement, make the commencement, the publication has been unavoidably delayed. However, from the forward state of the manuscript, I have the satisfaction to say, that one of the succeeding Parts will appear about every two months, until the whole be completed.

Occasionally, where it was thought that parts of the Precedents might be omitted, without destroying the efficacy of the deed, they are included within crotchets, thus [ ]; but this rarely happens: the parts within parentheses, thus ( ), are adapted to alternative circumstances (*a*).

On searching for any Form, the INDEX to the PRECEDENTS should invariably be consulted; because, although the Precedent sought for may not appear in the Table of Contents as a distinct instrument, yet in almost every instance it will be found as a part of some other deed; so that a person of common experience may, from this collection, easily draw any instrument in Conveyancing.

At the end of the Work, it is my intention to supply such information on the Principles and Practice of Conveyancing as may not have been previously included in the Annotations; and to give extracts from all the statutes in force relative to stamps on Deeds, &c., together with the decisions of the Courts of Law and Equity thereon.

From persons whose profession renders them so competent to appreciate the labour of selecting from many hundred Drafts, and voluminous Manuscript Collections of Precedents, and supplying Annotations on such a variety of subjects, I hope for indulgence for any errors I may have committed; because they will be sensible of the difficulties I have had to encounter.

W. M. BYTHEWOOD.

4, GRAY'S INN SQUARE,
August, 1821.

(*a*) In the present Edition the course has been to inclose within crotchets matter which is either *additional*, and not necessarily included in the scope of the instrument, or *substitutionary*.—ED.

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ADDENDA ET CORRIGENDA.

Page 8, note (*h*)—*for* "entry on distress" *substitute* "entry or distress."

Page 41, line 30—*for* "trusts resulting on trusts of operation of law" *substitute* "trusts resulting, or trusts by operation of law."

Page 59, margin—*for* "Time does not run" *substitute* "Time did not run."

Page 61, last line but two—*for* "tit. AGREEMENTS" *substitute* "tit. LEASES."

Page 92, margin—*for* "mortgagor's" *substitute* "mortgagee's."

Page 97, line 2 *et seq.*—*Sale by Trustees under a Trust for Sale—Consent of Tenant for Life—Settled Land Act*, 1882.]—Devise of real estate upon trust after death of testator's wife with all convenient speed to sell the same, and divide the proceeds among testator's fourteen children for their respective lives, with remainders over: *Pearson*, J., held, that under the absolute trust for sale the trustees had power effectually to sell and convey without the consent of the fourteen tenants for life, or any of them: his lordship said, "I am satisfied that the Act was never meant to interfere with the performance of a positive absolute duty, such as an absolute trust for sale. It is only intended to prevent trustees from exercising a discretionary trust or power vested in them, and to provide that such power and discretion shall not be exercised without the consent of the tenant for life:" *Taylor* v. *Poncia*, 32 W. R. 335.

Page 215, line 18—*for* "tit. POWERS" *substitute* "tit. APPOINTMENTS."

Page 235, note (*p*)—*for* "one of the special commissioners" *substitute* "one of the perpetual commissioners."

Page 404, note (*e*) — *Claim for Compensation after Completion of Purchase.*]—A. L. Smith, J., who took part in the decision of the case of *Joliffe* v. *Baker*, 11 Q. B. D. 225, in a recent case which came before him, sitting alone, on further consideration expressed his dissent from the observations of *Watkin-Williams*, J., quoted in this note, and stated that the ground of his own decision in *Joliffe* v. *Baker* was, that the action being an action for damages, the plaintiff could only succeed if he could establish a contract with the defendant and a breach of it by him, on an actionable tort committed by the defendant whereby the plaintiff had suffered damage; and his lordship held, in the case then before him, that he was bound by *Bos* v. *Helsham*, L. R., 2 Ex. 72, and *Re Turner and Skelton*, 13 Ch. D. 130; and that the purchaser was not debarred from claiming damages against the vendor for misdescription under the contract contained in the particulars and conditions of sale by an acceptance of a conveyance of the property: *Palmer* v. *Johnson*, 25 Ch. D. 32. See also on this question, *Perriam* v. *Perriam*, 49 L. T. 710.

Page 418, note—*Form of Notice under Sect.* 45 *of the Settled Land Act*, 1882.]—This question was recently discussed in the case of *Re Ray's Settled Estates*, 25 Ch. D. 464. This was a summons by the trustees of the settlement created by the will of H. B. Ray, that the notice given under sect. 45 of this Act on behalf of the tenant for life by his committee in lunacy, might be declared void as being too general in its terms. The notice was in the terms following:—"In the matter of the estates settled by the will of H. B. Ray, and in the matter of the Settled Land Act, 1882,—Take

notice that Herbert Reginald Ray (a person of unsound mind, by H. C. Wheeler the committee of his estate duly appointed) intends to make a sale or lease of all or any part of the said settled estate at any time or times after the expiration of one month from the date of this notice, as and when a proper opportunity for making any sale or lease in accordance with the powers and provisions of the Settled Land Act shall from time to time occur." The notice was held to be bad. *Pearson*, J., said: "I have come to the conclusion that the notice should be of a sale or lease of a specific portion of the settled estate which is contemplated at the time when the notice is given. I say that I have come to this conclusion on the words of the section, because those words are that the tenant for life is to serve the notice on the trustees—not when he is minded to exercise the powers given to him by the Act—but when he is 'intending to make a sale, exchange, partition, lease, mortgage or charge,' and this to my mind means a particular sale, exchange, lease, mortgage or charge contemplated at the time when the notice is given."

Page 467, note (*a*)—*for* "10 Geo. 4, c. 16" *substitute* "10 Geo. 4, c. 7."

Page 527, note—*Infant—Custody—Misconduct of Father—Right of Mother.*]—A discussion of the principles whereby the Court will be guided when the application to remove children from the custody of their father is made by the mother will be found in *Re Elderton*, 25 Ch. D. 220. The principal considerations are these, viz., the paternal right, the marital duty, and the interest of the children. See also *Re Clarke*, 21 Ch. D. 317.

Page 532, line 18—*after the words* "decease of such survivor" *add the words* "the person or persons to be nominated by him or her as aforesaid."

Page 557, Clause 7—*Restrictions put by Principal on Powers of Factor.*]—A factor entrusted with the possession of goods for the purpose of sale does not lose his character as such, or the right of lien attached to it, by reason of his acting under special instructions to sell in the name of and at prices fixed by his principal: *Stevens* v. *Buller* (C. A.), 25 Ch. D. 31.

Page 767—*Fraud on Powers—Arrangement with Appointee.*]—In *Re Kirwan's Trusts*, 25 Ch. D. 373, an appointment made in pursuance of an arrangement between the appointor, his daughter, on her marriage, and her intended husband, that a provision should be made out of the fund appointed for the second wife of the appointor, was held to be void, as being in fraud of the power.

MIDDLE TEMPLE

Jarman and Bythewood's

PRECEDENTS IN CONVEYANCING

ABSTRACTS.

PRELIMINARY DISSERTATION.

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1. The Commencement of the Abstract—Statutes of Limitations.

Statute of Limitations.

It is proposed to introduce in this place a general view of the operation of the Statute of Limitations (3 & 4 Will. 4, c. 27), as altered by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). In order to ascertain the effect of these statutes it will be necessary first to consider how the law stood before the former act was passed.

The rightful seisin of an estate of freehold may be interrupted in various ways, which are all included in the general terms of *disseisin* or *deforcement*. Disseisin also bears the special meaning of an eviction of a freeholder in possession; and deforcement, that of a wrongful holding over, after the determination of a rightful possession. The other varieties of disseisin are: abatement, which is a wrongful entry against an heir, upon the vacant possession after the death of the owner of the fee; and intrusion, which is a similar entry against a

Disseisin or deforcement.

Abatement.

Intrusion.

Statute of Limitations.

Disseisin.

remainderman or reversioner, upon the death of the particular tenant. There was also a disseisin of a remainderman or reversioner, by tortious alienation, where the particular tenant conveyed the fee by feoffment, which amounted to a forfeiture of his own estate, and by reason of the privity and confidence between him and the reversioner, and the solemnity of the conveyance, disseised the reversioner. With respect to the circumstances which were essential to constitute a disseisin of this kind, or a disseisin by deforcement, the doctrines of disseisin at election and tenancy at sufferance have introduced considerable uncertainty (*a*). See *Taylor* d. *Atkyns* v. *Horde*, 1 Bur. 60; *Doe* d. *Maddock* v. *Lynes*, 5 Dowl. & R. 160; and Co. Litt. 330 b, Butler's note.

Rights of entry, how formerly lost.

A disseisin put the true owner to his entry. A right of entry, upon which ejectment may be brought, was formerly capable of being barred by the effect of a descent-cast—a discontinuance—or a

Warranty.

warranty. The effect of a warranty is noticed elsewhere (*infra*, Vol. 2, sub tit. EXCHANGE). A

Descent-cast.

descent-cast was the defeating of the right of entry of a person who had been disseised, by the death of the disseisor in possession, and the descent of the estate upon his heir—and this effect took place, however quickly the descent followed the disseisin, except where the disseisin was by eviction,—in which case, the stat. 32 Hen. 8, c. 33, made five years' quiet possession by the disseisor necessary before a descent could toll the disseisee's right of entry. The effect might also have been prevented by a formal claim upon or in view of the land, within the year in which the descent happened;

Disseisin at election.

(*a*) Where a person entered by colour of a void grant, he was a disseisor (*Buckler's case*, 2 Co. 55 b; Cro. Eliz. 450); but where a grant is good in its inception, but is to be perfected by a subsequent ceremony, as if a feoffee enters before livery, he is no disseisor: 2 Co. 55. The term disseisin seems later to have been extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements, or hereditaments, so as to enable the owner to elect to claim a remedy against the obstructor as a disseisor: *Taylor* d. *Atkyns* v. *Horde*, *supra*. See also *Blunder* v. *Bangle*, Cro. Car. 302; *Pousley* v. *Blackman*, Cro. Jac. 659.

and even that was unnecessary to save the right, where the true owner was under disability, or where the disseisor, being a relation, claimed as heir, or where the effect of tolling the right of entry would have been to deprive the true owner of all remedy, —as, if he claimed under a condition broken, or a will,—and so could not bring a real action: *Matheson* v. *Trot*, 1 Leon. 209, the decision in which case appears to have been misapprehended in *Taylor* d. *Atkyns* v. *Horde*, 1 Bur. 65. Statute of Limitations.

Discontinuance was a tortious alienation of the fee by a tenant in tail in possession, by a bishop, &c., seised in right of his church, by a husband seised in right of his wife, or by a widow seised of an estate in dower; but since the stats. 11 Hen. 7, c. 20; 32 Hen. 8, c. 28; 1 Eliz. c. 19; 13 Eliz. c. 20; and 1 Jac. 1, c. 3, it did not, in the two latter cases, destroy the right of entry of the next claimant. If a tenant in tail, having been disseised, released his right to the disseisor, with a warranty binding his heirs, the effect of a discontinuance was also produced against all such of the heirs in tail of the party who made the warranty, as answered also to the description of his heirs general: such heirs in tail, being deprived by the warranty of their right of entry, were put to their formedon. Discontinuance.

The true owner also lost his right of entry if he did not prosecute his claim within the period prescribed by the stat. 21 Jac. 1, c. 16, of which the first section, after limiting the period for bringing writs of formedon *in descender*, *remainder*, or *reverter* (*b*), to twenty years "next after the title and cause of action first descended or fallen," enacted, that "no person or persons shall at any time hereafter *make any entry* into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend Stat. of Limitations, 21 Jac. 1, c. 16.

(*b*) The issue in tail were thus entirely barred under this statute, and had not, as was at one time supposed, successive rights: *Tolson* v. *Kaye*, 6 J. B. Moore, 542; 3 Brod. & B. 217; *Cotterell* v. *Dutton*, 4 Tau. 826; *Doe* d. *Daniell* v. *Woodroffe*, 15 M. & W. 769.

Statute of Limitations.

or accrue to the same, and in default thereof, such persons so not entering shall be utterly excluded and disabled from such entry after to be made."

Real actions.

After the right of entry was lost, the true owner still retained, in most cases, a right of action, which was either possessory, as were all writs of *entry* and *assize*, or droitural, to which belonged the writ of *right* and its varieties: See Com. Dig. *Assize*, *Droit*, and the table, tit. *Action*. In all these, the demandant was required to prove a former seisin, either in himself, or in the ancestor or other person from whom he derived his title. It was sufficient for a remainderman or reversioner, or the assignee of such, to allege a seisin in the settlor, and in some person entitled under the settlement: F. N. B. 204, &c. And under a writ of dower, it was not necessary to allege any seisin. But it was not competent for a person claiming under a devise, either executory or in possession, to sue upon the seisin of the devisor; and, therefore, if he had never entered under the devise, he could not (except in case of land devisable by custom, F. N. B. 199) recover in a real action. And a devisee in remainder was in the same situation, until entry by the particular devisee. Whether the seisin conferred by the Statute of Uses was a sufficient foundation for a real action, without actual entry, does not seem to have been decided: See Cro. Jac. 604.

At common law no period was fixed within which actions must be commenced, but important public events were from time to time stated as limits beyond which no actions could be brought: Shel. R. P. 146. The time for enforcing these rights of action was limited by the statute 32 Hen. 8, c. 2, in case the action was founded on the demandant's own seisin, to thirty years (sect. 3); in case it was founded on the seisin of the demandant's ancestor or predecessor, to sixty years, if it were a droitural action, and to fifty years, if it were a possessory action (sects. 1, 2, 6). By sect. 4, no avowry or conusance could be made for any rent, suit, or service, after fifty years from the seisin upon which the claim was founded. The time for making a

Stat. 32 Hen. 8, c. 2. Limitation of time for bringing real actions.

Statute of Limitations.

prescription was also, by the first section, limited to sixty years. Real actions by remaindermen and assignees of reversions, were not within the letter of the statute of Hen. 8 (for the word "predecessor" was considered to refer exclusively to corporations sole), but they were held to be within its spirit; and it was further laid down, that the statute in such cases limited the remedy to a period of fifty years from the seisin of the settlor, and not thirty from that of the tenant for life; so that, if the tenant for life lived more than thirty years after the making of the settlement, the remainderman's remedy by ejectment might have subsisted (even subsequently to the statute of James 1) after his right of action had been barred: *Widdowson* v. *Earl of Harrington*, 1 J. & W. 532. Both of the above-mentioned statutes extended to lands of copyhold tenure (*c*).

Remaindermen and assignees of reversions.

Stat. 4 Hen. 7, c. 24. Bar by fine and non-claim.

The disturbances of the civil wars, and the consequent necessity of quieting titles, led to the passing of the Statute of Fines, 4 Hen. 7, c. 24, the arbitrary provisions of which long survived the peculiar circumstances by which alone they were justifiable. That statute gave to a fine with proclamations levied by a person in possession, either rightfully or otherwise, of an estate of freehold, the effect of barring the rights of all persons having present rights of entry, and not being under disability, if they did not claim within five years after the last proclamation; and it barred all persons under disabilities when the fine was levied, if they did not claim within five years after their disabilities were removed; and all persons not having present rights, if they did not claim within five years after their rights of entry accrued—unless they were under disabilities—and then within five years after such disabilities had ceased; or unless, in any of these cases, an entry or claim was made within the period. And the entry or claim to exclude the bar under the above act, or under

Stat. 4 Anne, c. 16. Entry or claim to preserve rights.

(*c*) The provisions of these two statutes were extended to Ireland by the Irish stat. 10 Car. 1, sess. 2, c. 6.

Statute of Limitations.

the statute of James 1, was required, by the stat. 4 Anne, c. 16, s. 16, to be followed up within the year by an action. The provision for disabilities in the Statute of Fines, was held not to extend to *successive* disabilities: *Dillon* v. *Leman*, 2 H. Bl. 584.

The material inquiry as to the effect of a fine and non-claim generally was whether the party levying the fine had at the time an estate of freehold in the land—acquired either rightfully or by some one of the general modes of disseisin above mentioned,—for if he were not in possession at all, or in possession as tenant at sufferance, or for any other merely chattel interest, the fine would be inoperative, as having been levied by a stranger to the freehold (*d*): See *Davies* v. *Lowndes*, 7 Scott, 21; *Doe* d. *Burrell* v. *Perkins*, 3 M. & S. 271; *Carter* v. *Barnardiston*, 1 P. Wms. 505.

Obsolete Statutes of Limitation.

Other statutes respecting limitations, which are now obsolete, are the stat. 1 Mary, sess. 2, c. 5 (relating to advowsons); 10 & 11 Will. 3, c. 14 (writ of error for reversing a fine, recovery, or judgment); 7 Anne, c. 18 (advowsons); and 14 Geo. 2, c. 20 (relating to loss of recovery deeds or records).

Adverse possession under the stat. 21 Jac. 1, c. 16.

Actual seisin, it has been seen, was essential to the operation of a fine as a bar; and, upon principle, it should seem that there could have been no *adverse possession* sufficient to bar the true owner's entry under the Statute of Limitations of Jac. 1, unless he was actually disseised, and the party in possession, therefore, seised in such manner as would have been sufficient support to a fine levied by him. Unless the true owner was dispossessed of his *freehold*, there could be no adverse possession of it against him. Accordingly, in *Reading* v. *Rawsterne* (2 Lord Raym. 829; 1 Salk. 242), it was held, that "the Statute of Limitations does not bar a man, but where there is an actual disseising:" See *Doe* d. *Dunraven* v. *Williams*, 7 Car. & P. 332. In

(*d*) Fines being now abolished by the stat. 3 & 4 Will. 4, c. 74, s. 1, a title can no longer be obtained by fine and non-claim.

Statute of Limitations.

the case of *Doe* d. *Parker* v. *Gregory* (4 Nev. & M. 308), however, the law was stated otherwise. In that case, a husband had come in originally in his wife's right, and had not directly ousted the rightful owner, but merely continued where he was to the exclusion of that owner; his interest having expired by his wife's death, it was held that the continuing of this possession for twenty years entitled the husband to the protection of the Statute of Limitations.

Adverse possession.

Stat. 3 & 4 Will. 4, c. 27. Royal assent, July 24, 1833.

The statute 3 & 4 Will. 4, c. 27, intituled, "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," is as follows:—

Meaning of the words in the act:—

Sect. 1, enacts, "That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction (*e*), be interpreted as follows, (that is to say), the word '*land*' (*f*) shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (*g*) (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word '*rent*' (*h*) shall extend to all

"Land."

"Rent."

(*e*) Acts imposing limitations on rights of action, being "statutes of repose," will receive a liberal interpretation: *Tolson* v. *Kaye*, 6 J. B. Moore, 558; see also Broom, Leg. Max. 343, 892.

(*f*) Tolls payable in respect of a turnpike road are neither land nor money charged upon or payable out of land, and, therefore, are not within the statute: *Mellish* v. *Brooks*, 4 Jur. 739.

Turnpike tolls.

(*g*) As to the operation of the statute with regard to claims for tithes, *vide infra*, p. 49, note.

(*h*) The term "rent" includes quit rents: *De Beauvoir* v. *Owen*, 5 Exch. 166; 19 L. J., Ex. 177; *Lord Chichester* v. *Hall*, 17 L. T. 121.

A heriot may be defined as a right, arising in a manor upon death or alienation of a tenant, to take a specific chattel, *e.g.*, the tenant's best beast. Heriots are of two kinds, viz., heriot service and heriot custom. The former are such as are due upon a special reservation in a grant or lease of lands, and, therefore, amount to little more than a mere rent; the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom: 2 Bl. Com. 422. See also 2 Saund. 166.

Statute of Limitations.

heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and

Person through whom another claims.

the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as *heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise*, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by *escheat;* and the

"Person."

word '*persons*' shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons (*i*), as well as

Number and gender.

an individual (*k*); and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

Sect. 2. [Repealed by 37 & 38 Vict. c. 57, s. 9. See the substituted section, 37 & 38 Vict. c. 57, s. 1, *post*, p. 23.]

When the right shall be deemed to have accrued:—

Sect. 3. "That, in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent (*l*), shall be deemed to have first accrued at such time as

---

It would appear that heriots payable at uncertain intervals which might exceed twenty years are not within the meaning of the term: see Baron Parke's judgment in *Owen* v. *De Beauvoir*, 16 M. & W. 566. And see *De Beauvoir* v. *Owen*, *supra*.

In the recent case of *Lord Zouche* v. *Dalbiac* (L. R., 10 Ex. 172), it was held that the seizure by the lord was not making an entry on distress, nor bringing an action to recover rent within the meaning of this act, and that the lord's title was not barred notwithstanding that a heriot became due more than twenty years since the last occasion of seizure occurred, and that the lord did not then enforce his right.

(*i*) The poor of a parish are "a class of persons" within the meaning of this section as regards rents of land applicable for their benefit: *Att.-Gen.* v. *Magdalen College, Oxford*, 6 H. L. 189; *S. C.*, 26 L. J., Ch. 620.

(*k*) As to spiritual or eleemosynary corporations sole, see sect. 29.

(*l*) Where a lord seized copyholds quosque, and held them for nearly forty years, a bill by the heir of the former tenant to compel admittance by the lord was held to be an action to recover land within this section and to be barred accordingly: *Walters* v. *Webb*, L. R., 5 Ch. 531.

hereinafter is mentioned (*m*), (that is to say), when the person claiming such land or rent, or some person through whom he claims, shall in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt (*n*), then such right shall be deemed to have first accrued *at the time of such dispossession or discontinuance of possession* or *at the last time at which any such profits or rent were or was so received*; And when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued *at the time of such death*; And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by *any instrument* (*other than a will*) to him, or some person through whom he claims, by a person being, *in respect of the same estate or interest*, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued *at the time at which the person claiming as aforesaid*, or *the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument*; And when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest (*o*), and no person

Statute of Limitations.

1. Where estate once in possession;

2. in case of abatement;

3. alienation *inter vivos*;

4. future estates;

(*m*) These instances are given merely by way of illustration, and do not limit the operation of sect. 2 (now 37 & 38 Vict. c. 57, s. 1). See *James* v. *Salter*, 2 Bing. N. C. 505.

(*n*) To bring a case within this branch of the section there must be actual possession by the person setting up the statute, whether adverse or not, and the right of possession not enforced or exercised in another person (*Howlin* v. *Sheppard*, 19 W. R. 253); and in the case of rents with knowledge that payment has not been made: *Adnam* v. *Earl of Sandwich*, 2 Q. B. D. 490. Non-user of mines is no evidence of abandonment of right to work: *Seaman* v. *Vawdrey*, 16 Ves. 390. See further as to the operation of this statute with regard to mines, *Smith* v. *Lloyd*, 9 Exch. 562; *S. C.*, 23 L. J., Ex. 194; *Earl of Dartmouth* v. *Spittle*, 19 W. R. 444; *Ashton* v. *Stock*, 6 Ch. D. 719.

(*o*) See, as to what is a future estate or interest, *James* v. *Salter*, 4 Scott, 180; *infra*, p. 39; *Jumpsen* v. *Pitchers*, 13 Sim. 327; *Doe* d. *Johnson* v. *Liversedge*, 11 M. & W. 517.

Statute of Limitations.

shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued *at the time at which such estate or interest became an estate or interest in possession* (*p*); And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition (*q*), then such right shall be deemed to have first accrued *when such forfeiture was incurred*, or *such condition was broken*."

5. forfeiture or breach of condition.

Forfeiture :—Where advantage of forfeiture is not taken by reversioner or remainderman, he shall have a new right when his estate comes into possession.

Sect. 4. "That, when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened" (*r*).

Sect. 5. [Repealed by 37 & 38 Vict. c. 57, s. 9. See the substituted provisions in sect. 2 of that act, *infra*, p. 24.]

Administrator :—Administrator to claim as if no interval occurred between death and grant of letters of administration.

Sect. 6. "That, *for the purposes of this act*, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration" (*s*).

Tenancy at will :—Right of party en-

Sect. 7. "That, when any person *shall be* in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or

---

(*p*) See *Earl of Bandon* v. *Becher*, 3 Cl. & F. 479. As to mortgagees, *vide* stat. 7 Will. 4 & 1 Vict. c. 28, stated *infra*, p. 21.

(*q*) See *Whitton* v. *Peacock*, 3 My. & K. 325.

(*r*) The terms "forfeiture or breach of condition" extend to forfeitures which tend to accelerate an estate under a conditional limitation, as well as to forfeitures of which only the heir-at-law can take advantage. See *Astley* v. *Earl of Essex*, L. R., 18 Eq. 290: which was a case of forfeiture for non-compliance with a name-and-arms clause.

(*s*) Previously to this enactment, the rule was, that time did not run against an administrator, except from the period of the grant of the letters of administration. There was in the statute of James no saving in cases where there was no party to be sued.

of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, *at which time such tenancy shall be deemed to have determined* (*t*). Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

Sect. 8. "That when any person *shall be* in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year *or other period, without any lease in writing,* the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)" (*u*).

Sect. 9. "That when any person *shall be* in possession (*x*) or in receipt of the profits of any land, or in receipt of any rent (*y*), by virtue of a lease in writing, by which a rent amounting to the

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titled subject to a tenancy at will, shall be deemed to have accrued at the determination of the tenancy, or at the end of one year from its commencement.

Yearly tenancy :— Right of party entitled subject to a tenancy from year to year, shall be deemed to have accrued at the end of the first year or last payment of rent.

Lease :— Where rent

(*t*) See as to the acquisition of title by possession, as against a public corporation restrained by its act from alienation, *Mayor of Brighton* v. *Guardians of Brighton*, 5 C. P. D. 368. See observations on this section, *infra*, p. 31.

As to what constitutes a tenancy at will within this section, see *Hodgson* v. *Hooper*, 29 L. J., Q. B. 222 ; *Locke* v. *Matthews*, 32 L. J., C. P. 98 ; *Day* v. *Day*, L. R., 3 P. C. 751 ; and *Whitmore* v. *Humphries* (a case of encroachment by lessee on adjoining land of his lessor), L. R., 7 C. P. 1.

As to occupation under an agreement for a lease, see *Drummond* v. *Sant*, L. R., 6 Q. B. 763.

(*u*) A service for which distress may be made is rent within this section, *e.g.*, sweeping a church, and tolling the bell : *Doe* v. *Benham*, 7 Q. B. 976.

(*x*) The possession of an agent is possession of the principal ; the principal may, therefore, acquire a possessory title to land by receiving the rents for twelve years through an agent, although that agent is the person really entitled to the estate. "Wrongfully claiming," within the meaning of this section, means claiming without any real title ; and the section applies to a claim put forward under a mistake, without any design to improperly deprive others of their property : *Williams* v. *Pott*, L. R., 12 Eq. 149.

(*y*) This section is retrospective ; the term rent throughout the section signifies rent-charge : *Doe* v. *Angell*, 9 Q. B. 328, 355. See also *Grant* v. *Ellis*, 9 M. & W. 113.

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amounting to 20*s.* reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received *by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease*, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled" (*z*).

Entry:—A mere entry not to be deemed possession.

Sect. 10. "That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon" (*a*).

Continual claim:—No right to be preserved by continual claim.

Sect. 11. "That no continual or other claim upon or near any land, shall preserve any right of making an entry or distress, or of bringing an action" (*b*).

Coparceners, &c.:—Possession of one coparcener, &c. not to be the possession of the others.

Sect. 12. "That, when any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them" (*c*).

(*z*) See *Doe* v. *Danvers*, 7 East, 299; Gilb. Ten. 97.

(*a*) As to what acts are sufficient acts of ownership, so as to interrupt possession, see *Doe* d. *Baker* v. *Coombes*, 19 L. J., C. P. 306; see also *Worssam* v. *Vandenbrande*, 17 W. R. 53; *Searby* v. *Tottenham Rail. Co.*, L. R., 5 Eq. 409.

(*b*) *Hodle* v. *Healey*, 1 V. & B. 540; *Anon.*, 2 Atk. 15.

(*c*) As to how coparceners were affected by the old Statutes of Limitation, see Co. Litt. 243 b, 373 b. See also *Doe* v. *Pearson*, 6 East, 173. The effect of this section is that entry on land by one coparcener cannot be considered as vesting the possession in the other: *Woodroffe* v. *Doe* d. *Daniell*, 2 H. L. 811; 15 M. & W. 792. See also *Williams* v. *Williams*, L. R., 2 Ch. 294; *Ward* v. *Ward*, L. R., 6 Ch. 789.

On the death of A. in 1857, T. and J. entered into wrongful possession of his lands, and remained in possession till J.'s death in

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Sect. 13. "That, when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, *shall enter* into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir" (*d*).

Younger brother, &c.:— Possession of a younger brother, &c. not to be the possession of the heir.

Sect. 14. "That, when any acknowledgment of the title of the person entitled to any land or rent shall have been given *to him or his agent*, in writing, *signed by the person in possession* or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same; and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given" (*e*).

Acknowledgment of title:— Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent at that time.

1874. T. remained in sole possession till 1880: it was held, that T. had then acquired the fee simple of the land: *Bolling* v. *Hobday*, 31 W. R. 9.

(*d*) See Co. Litt. 242 a; Gilb. Ten. 28; *Sharington* v. *Stroton*, Plowd. 300; *Doe* d. *Wawen* v. *Horn*, 3 M. & W. 333; *Doe* d. *Draper* v. *Lawley*, 3 Nev. & M. 331; *Ex parte Hasell*, 3 Y. & C., Ex. 617; *Jones* v. *Jones*, 16 M. & W. 712.

(*e*) An acknowledgment under this section, signed by the agent of the person in possession, would not be sufficient; *aliter*, as regards acknowledgments under sects. 40 (now 37 & 38 Vict. c. 57, s. 8) and 42, *infra*, pp. 20, 28. The construction of a doubtful document, given in evidence as an acknowledgment to defeat the Statute of Limitations, is for the court and not for the jury: *Morrell* v. *Frith*, 3 M. & W. 402; *Doe* d. *Curzon* v. *Edmonds*, 6 M. & W. 295. As to the admissibility of parol evidence under Lord Tenterden's Act, where the written acknowledgment had been lost, see *Haydon* v. *Williams*, 4 Moo. & Pay. 811; *Edmunds* v. *Downes*, 2 Cr. & M. 459. See, as to what is sufficient acknowledgment, *Incorporated Society* v. *Richards*, 1 Dr. & W. 290; *Fursdon* v. *Clogg*, 10 M. & W. 572; *Goode* v. *Job*, 5 Jur., N. S. 145; *Jaynes* v. *Hughes*, 10 Exch. 430; *Trulock* v. *Robey*, 12 Sim. 402; and *Chasemore* v. *Turner*, L. R., 10 Q. B. 500. Where a tablet let into a wall stated by whom the wall was built, and to whom it belonged, it was held that so long as the inscription remained, no question of the statute or of adverse possession could properly arise: *Phillipson* v. *Gibbon*, L. R., 6 Ch. 428.)

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Sect. 15. [This section is obsolete.]

Sects. 16, 17. [These sections are repealed by 37 & 38 Vict. c. 57, s. 9. See the substituted provisions in sects. 3, 4, 5 of that act, *infra*, p. 24.]

Successive disabilities :—No further time to be allowed for a succession of disabilities.

Sect. 18. "That, when any person *shall be* under any of the disabilities hereinbefore mentioned (*f*) at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent, beyond the said period of [twelve (*g*)] years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of [six (*h*)] years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person" (*i*).

Sect. 19. [This section is obsolete.]

Concurrent rights :—When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred, unless another person recovers in respect of a mediate right.

Sect. 20. "That, when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, *at any time during the said period*, have been entitled to *any other estate, interest, right or possibility, in reversion, remainder, or otherwise*, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession" (*k*).

(*f*) These disabilities are enumerated in sect. 3 of the Real Property Limitation Act, 1874, *infra*, p. 24.

(*g*) Substituted for "twenty" by sect. 9 of the Real Property Limitation Act, 1874, *infra*, p. 28.

(*h*) Substituted for "ten" by sect. 9 of the Real Property Limitation Act, 1874.

(*i*) Where a person to whom a right accrues to bring an action for recovery of land is under a disability, and before its termination falls under another disability, this section preserves the right of action until six years after the termination of the latter disability: *Borrows* v. *Ellison*, L. R., 6 Exch. 129.

(*k*) See as to the effect of this section, *Doe* d. *Johnson* v. *Liversedge*, 11 M. & W. 517; *Doe* d. *Hall* v. *Moulsdale*, 16 M. &. W. 689.

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Sect. 21. "That, when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress or action, shall be made or brought by any person claiming any estate, interest or right, which such tenant in tail might lawfully have barred" (*l*).

Estate tail:—Where tenant in tail is barred, those whom he might have barred shall not recover.

Sect. 22. "That, when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action."

Possession adverse to a tenant in tail shall be adverse to those whom he might have barred.

Sect. 23. [This section is repealed by sect. 9 of the stat. 37 & 38 Vict. c. 57. See the substituted provision in sect. 6 of that act, *infra*, p. 26.]

Sect. 24. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry, or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity."

Suits in equity:—No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

Sect. 25. "That, when any land or rent *shall be* vested in a trustee upon any express trust (*m*), the right of the *cestui que trust*,

Express trusts:—In cases of express trust,

(*l*) See *Austin* v. *Llewellyn*, 9 Exch. 276. When time has begun to run against a tenant in tail who afterwards dies, the remainderman is not saved by being under disability when his estate falls into possession: *Goodall* v. *Skerratt*, 3 Dr. 216. In *Cannon* v. *Rivington* (12 C. B. 1), it was considered that the estate of a tenant in tail in possession came under this section; but in a recent case, Bramwell, B., held that sects. 21, 22, applied only to estates in reversion or remainder, and that the provision applicable to the case referred to was sect. 2: *Earl of Abergavenny* v. *Brace*, L. R., 7 Exch. 145.

(*m*) This section is confined to "express trusts" (as to which, *vide infra*, pp. 32, 41), in which the relation of trustee and *cestui que trust* is clearly established (*Law* v. *Bagwell*, 4 Dr. & W. 398; *Young* v. *Lord Waterpark*, 13 Sim. 204); it is not, however, essential that the word "trust" should have been employed (*Hunt*

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the right shall not be deemed to have accrued until a conveyance to a purchaser, and then only against such purchaser.

or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

Fraud:—In cases of fraud no time shall run whilst the fraud remains concealed.

Sect. 26. "That, in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered; Provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed" (*n*).

Proviso for purchasers without notice.

Acquiescence:—Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

Sect. 27. "That nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity, in *refusing* relief on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act" (*o*).

Sect. 28. [Repealed by 37 & 38 Vict. c. 57, s. 9. See the substituted provisions in sect. 7 of that act, *post*, p. 26.]

Ecclesiastical and eleemosynary corporations sole:—No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole, but within two

Sect. 29. "That it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make any entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall have first accrued: (that is to say), the period during which two

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v. *Bateman*, 10 Ir. Eq. R. 360); and not to trusts by implication: *Petre* v. *Petre*, 1 Dr. 393; *Townshend* v. *Townshend*, 1 Cox, 28.

(*n*) In cases of *mistake* time did not formerly run until the discovery of the mistake: *Brooksbank* v. *Smith*, 2 Y. & C., Ex. 58. The statute has no savng for such cases. As to the effect of this section, *vide infra*, p. 43.

(*o*) *Vide infra*, p. 44.

persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and, if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said thirty-first day of December, one thousand eight hundred and thirty-three, no such entry, distress, action, or suit, shall be made or brought at any time beyond the determination of such period" (*p*).

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incumbencies and six years, or within sixty years.

Sect. 30. "That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say), the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and, if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years" (*q*).

Advowsons:— No advowson to be recovered after three adverse incumbencies, or sixty years.

(*p*) Adverse possession was formerly a bar only to the rector or vicar against whom it had been enjoyed, not binding successors for however long a period it was continued: *Croft* v. *Howell*, Plowd. 538; *Barker* v. *Richardson*, 4 B. & A. 579. This section does not apply to the Ecclesiastical Commissioners in respect of property of a deanery vested in them by virtue of 3 & 4 Vict. c. 113. Such a case is governed by 37 & 38 Vict. c. 57, s. 1: *Ecclesiastical Commissioners* v. *Rowe*, 5 App. Cas. 736.

(*q*) There was formerly no limitation of the right to an advowson, except the period of legal memory—the commencement of the reign of Rich. 1. The stat. 1 Mar. sess. 2, c. 5, declared that the stat. 32 Hen. 8, c. 2, did not extend to advowsons; and by the stat. 7 Anne, c. 18, it was enacted, that no usurpation should displace the estate or interest of any person entitled to an advowson; the object of which enactment was to enable the patron to proceed at once by *quare impedit*, without previously removing the effect of the usurpation by an assize or writ of right, as the

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Advowson—Lapse:—Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics.

Sect. 31. "That, when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but, when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop."

Entailed advowson:—When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

Sect. 32. "That, in the construction of this act, every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right, which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action, or suit, shall be limited accordingly."

Advowson—Extreme period:—No advowson to be recovered after 100 years.

Sect. 33. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit, to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some persons through whom he claims, or of some person entitled in respect of an estate, share, or right, held or derived under the same title."

Extinction of right:—At the end of the period of limitation the right of the party out of

Sect. 34. "That, at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the *right and title* of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively

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case might be. See Co. Litt. 115 a. See further, as to effect of this section, *Robinson* v. *Marquis of Bristol*, 20 L. J., C. P. 208; *S. C.* 15 Jur. 926. See as to Ireland, 6 & 7 Vict. c. 54, and 7 & 8 Vict. c. 27.

might have been made or brought within such period, shall be *extinguished*" (*r*).

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possession to be extinguished.

Sect. 35. "That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act."

Receipt of rent:—To be deemed receipt of profits as against lessees.

Sect. 36. [Real and mixed actions, &c., abolished after the 31st December 1834.]

Real and mixed actions abolished.

Sects. 37, 38. [Repealed by Statute Law Revision Act 1874, (37 & 38 Vict. c. 35).]

Sect. 39. "That no descent cast, discontinuance, or warranty, which may happen or be made after the said thirty-first day of December, one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land."

Descent cast, &c.:—No descent, warranty, &c. to bar a right of entry.

Sect. 40. [Repealed by 37 & 38 Vict. c. 57, s. 9. See the substituted provisions in sect. 8 of that act, *infra*, p. 28.]

Sect. 41. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit" (*s*).

Arrears of dower:—No arrears of dower to be recovered for more than six years.

(*r*) The old statutes in England (with the exception of the Statutes of Fines) barred the *remedy* only. Under this act, where the remedy is barred, the right and title of the real owner are extinguished, and transferred to the person whose possession is a bar: *Incorporated Society* v. *Richards*, 1 Dr. & W. at p. 289. See also *Doe* v. *Sumner*, 14 M. & W. 39. No subsequent payment or acknowledgment is of any avail to restore the extinguished title: *Brassington* v. *Llewellyn*, 27 L. J., Ex. 297; *Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284; *Sanders* v. *Sanders*, 19 Ch. D. 373. Adverse possession by successive independent trespassers for a period exceeding twelve years confers no right on any one of them who has not himself had possession uninterruptedly for twelve years, except as furnishing a defence to a trespasser in possession against an action by the rightful owner: *Dixon* v. *Gayfere*, 17 Beav. 421; 23 L. J., Ch. 60. See as the acquisition of a good title by adverse possession, *Paine* v. *Jones*, L. R., 18 Eq. 320.

A purchaser will be compelled to accept a title depending on parol evidence of adverse possession: *Scott* v. *Nixon*, 3 Dr. & W. 388. See also *Tuthill* v. *Rogers*, 6 Ir. Eq. Rep. at p. 441.

(*s*) Before this act there was no limit to claims for arrears of dower either at law or in equity: *Oliver* v. *Richardson*, 9 Ves. 222. See also *Dormer* v. *Fortescue*, 3 Atk. 130; *Tilley* v. *Bridge*, 2 Vern. 519. See the Law of Dower Amendment Act, 3 & 4 Will. 4, c. 105; and *Bamford* v. *Bamford*, 5 Ha. 203; *Marshall* v. *Smith*, 5 Giff. 37; 13 W. R. 198.

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Arrears of rent or interest:— No arrears of rent or interest to be recovered for more than six years.

Sect. 42. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three (*t*), no arrears of rent (*u*) or of interest in respect of any sum of money charged upon or payable out of any land (*x*) or rent, *or in respect of any legacy*, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years (*y*) next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, *or his agent*, signed by the person by whom the same was payable, *or his agent* (*z*): Provided, nevertheless, that where any

Exception in case of prior incumbrances.

(*t*) This clause does not apply to suits commenced before the passing of the act: *Paddon* v. *Bartlett*, 5 Nev. & M. 383; *S. C.* 3 A. & E. 887.

(*u*) It is doubtful whether "rent" here includes heriots: *Lord Zouche* v. *Dalbiac*, L. R., 10 Ex. 172.

(*x*) The proceeds of land devised upon trust for sale was held to be money payable out of land within this section: *Bowyer* v. *Woodman*, L. R., 3 Eq. 313. See as to proceeds of sale of land paid into court, *Edmunds* v. *Waugh*, L. R., 1 Eq. 418; *Re Stead's Estates*, 2 Ch. D. 713.

(*y*) This clause contains no saving of the rights of persons under disabilities.

(*z*) An acknowledgment, signed by an agent, is not sufficient under the stat. 9 Geo. 4, c. 14, s. 1 (*Hyde* v. *Johnson*, 3 Scott, 289); nor in cases regulated by the other sections of this act, except the 40th (now 37 & 38 Vict. c. 57, s. 8) and the 42nd. An acknowledgment of a debt by the agent of a trustee for payment of debts, is sufficient to keep alive the creditor's claim; and it need not state the amount due: *Lord St. John* v. *Boughton*, 9 Sim. 219. See *Hargreaves* v. *Michell*, 6 Mad. 326. In admitting acknowledgments under this section the courts have adopted a liberal construction of the language of the act. An acknowledgment made by schedule, affidavit, or answer is sufficient: *Blair* v. *Nugent*, 3 Jo. & L. at p. 673; *Goode* v. *Job*, 5 Jur., N. S. 145; *Moodie* v. *Bannister*, ib. 402; and see *Burrowes* v. *Gore*, 6 H. L. 907. A master's report under the old practice has been held to be insufficient: *Hill* v. *Stawell*, 2 Ir. L. R. 302; *S. C.* 2 Jebb & S. 389. An admission of a judgment debt in a will is a sufficient acknowledgment (*Millington* v. *Thompson*, 3 Ir. Ch. R. 236); so also an admission of a debt in an insolvent's schedule: *Basset* v. *Birmingham*, 4 Ir. Eq. R. 537; *Hanon* v. *Power*, 8 Ir. L. R. 505. See also *Roddan* v. *Morley*, 1 De G. & J. 1; *Pears* v. *Laing*, L. R., 12 Eq. 41. The admission of the debt must be one implying or expressing a promise to pay absolutely or upon a condition which is proved to have been performed. See *Prance* v. *Sympson*, Kay, 678; *Re River Steamer Company, Mitchell's Claim*, L. R., 6 Ch. 822. See also *Hammond* v. *Smith*, 33 Beav. 452; *Toft* v. *Stephenson*, 5 De G., M. &. G. 735. The following documents have been held to be insufficient to bar the operation of the act:

prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years" (*a*). Statute of Limitations.

Sect. 43. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person, claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity." *Spiritual Courts:*—Act to extend to the spiritual courts.

Sect. 44. "That this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit* to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland." Act not to extend to Scotland, nor to advowsons in Ireland (*b*).

* *Sic.*

Doubts having been entertained whether, under the above act, a mortgagee was not barred of his right in every case, after the lapse of twenty years from the date of the deed, the statute 7 Will. 4 & 1 Vict. c. 28, was passed, which enacted: 7 Will. 4 & 1 Vict. c. 28. Royal assent, 3rd July, 1837.

"That it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make Mortgagees within the definition in 3 & 4 Will. 4, c. 27, s. 1, may bring

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an agreement to submit a disputed account to arbitration (*Hales* v. *Stevenson*, 9 Jur., N. S. 300); a letter proposing a composition (*Everett* v. *Robinson*, 4 Jur., N. S. 1083); a letter stating inability to pay and begging for indulgence: *Rackham* v. *Marriott*, 3 Jur. N. S. 495. An acknowledgment of the mortgagor's title given by one of two co-mortgagees is wholly inoperative to keep alive the right of redemption: *Richardson* v. *Younge*, L. R., 6 Ch. 478.

(*a*) It would appear that the fact of an interest being reversionary does not prevent the operation of this section in barring arrears beyond six years: *Smith* v. *Hill*, 9 Ch. D. 143. See also *Re Slater's Trusts*, 11 Ch. D. 227.

(*b*) The Statute of Limitations does not apply to Jamaica: *Pitt* v. *Lord Dacre*, 3 Ch. D. 295. Its provisions were introduced into New South Wales by the Act No. 3 of 1837. See *Day* v. *Day*, L. R., 3 P. C. 751.

Statute of Limitations.

actions to recover land within [twelve] years after last payment of principal or interest.

an entry or bring an action at law or suit in equity to recover such land at any time within [twelve (*c*)] years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than [twelve (*c*)] years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said act notwithstanding" (*d*).

(*c*) Substituted for twenty by 37 & 38 Vict. c. 57, s. 9, *post*, p. 28.

(*d*) See *Doe* d. *Higginbotham* v. *Barton*, 4 Jur. 432. When the mortgage deed contains no provision for quiet enjoyment by the mortgagor until default, the twelve years are counted from the date of the deed, if no payment of interest has been made, not from the day of default: *Doe* d. *Roylance* v. *Lightfoot*, 8 M. & W. 553.

A., in 1821, became entitled to land in fee simple in possession, and from that time until the action was brought in 1851 allowed B. to occupy the land without payment of rent or any acknowledgment of A.'s title. In 1823 A. mortgaged the property to C. for 500 years and paid interest without B.'s knowledge until 1841. The lessor of the plaintiff was the surviving executor of C. It was held that the lessor of the plaintiff, having brought his action within twenty years after the last payment of interest, was not barred, although more than twenty years had elapsed since the right to bring such action had first accrued: *Doe* d. *Palmer* v. *Eyre*, 17 Q. B. 366; *S. C.* 20 L. J., Q. B. 431.

On a purchase of lands which were under mortgage, the purchaser paid the principal and interest due on the mortgage, and took a conveyance from both mortgagee and mortgagor of the premises and of the equity of redemption; it was held that the purchaser was a person "claiming under" a mortgage, and that the twenty years' limitation under the stat. 3 & 4 Will. 4, c. 27, s. 2 ran, from the paying-off of the mortgage and interest: *Doe* d. *Baddeley* v. *Massey*, 17 Q. B. 373; 20 L. J., Q. B. 434. See also *Doe* v. *Williams*, 5 A. & E. 291.

A conveyance by a mortgagor of his equity of redemption recited that all interest had been paid up to the date thereof. The deed also contained a covenant by the assignee to pay the principal and future interest; it was held in an action by the mortgagee against the mortgagor on the mortgage deed, that the recital in the conveyance (which was made within twenty years of action brought) was a sufficient acknowledgment to take the case out of the statute 3 & 4 Will. 4, c. 42, s. 5: *Forsyth* v. *Bristowe*, 8 Ex. 716; *S. C.* 22 L. J., Ex. 255.

As to whether this act extends to the case of a grantee of an annuity, the grantor of which has been more than twelve years in possession of the land charged, see *Searle* v. *Colt*, 1 Y. & C. C. C. 36; *Francis* v. *Grover*, 5 Ha. 39; *Re Ashwell's Will*, Johns. 112.

Real Property Limitation Act, 1874.

Royal assent, August 7, 1874.

The statute 37 & 38 Vict. c. 57, intituled, "An Act for the further Limitation of Actions and Suits relating to Real Property," enacts as follows:

No land or rent to be recovered, but within twelve years after the right of action accrued (*e*).

Sect. 1. "After the commencement of this act no person (*f*) shall make an entry (*g*) or distress, or bring an action or suit, to recover (*h*) any land (*f*) or rent (*i*), but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same" (*k*).

(*e*) This section is substituted for sect. 2 of the Statute of Limitations (3 & 4 Will. 4, c. 27), repealed by sect. 9 of this act. The provision contained in sect. 2 of the former act is here re-enacted almost *verbatim*, except that the period here fixed is twelve years instead of twenty as heretofore.

(*f*) For definitions of these terms, see 3 & 4 Will. 4, c. 27, s. 1, *ante*, p. 7.

(*g*) See *Holmes* v. *Newlands*, 11 A. & E. 44.

(*h*) Where copyholds had been seized *quousque*, a bill by the heir of the copyholder to compel admittance by the lord was held to be "a suit to recover land" and to be barred by the statute: *Walters* v. *Webb*, L. R., 5 Ch. 531. The repealed sect. 2 was held by the Court of Exchequer not to prevent a person who had received no tithes for twenty years from recovering them from the occupier, but to be confined to cases where there are two parties claiming adverse estates in the tithes: *Dean of Ely* v. *Cash*, 15 M. & W. 617. But by 53 Geo. 3, c. 127, s. 5, suits to recover the value of tithes must be commenced within six years from the time when such tithes became due. See *Robinson* v. *Purday*, 16 M. & W. 11; *Goode* v. *Waters*, 20 L. J., Ch. 72.

(*i*) Rent is defined by 3 & 4 Will. 4, c. 27, s. 1, to include heriots, services and suits for which a distress may be made, and annuities, &c. charged upon or payable out of land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole; but it has been held that it is used in sect. 2 of that act (for which this section is substituted) in the sense of a rent-charge only. See *Paget* v. *Foley*, 2 Bing. N. C. 679; *Grant* v. *Ellis*, 9 M. & W. 113. A lessor's right to rent under a lease is not barred by non-payment for however long a period: *Archbold* v. *Scully*, 9 H. L. 360.

(*k*) As to mortgages, *vide* stat. 7 Will. 4 & 1 Vict. c. 28, stated above, p. 21.

A legal mortgage of land was executed in 1856; no possession by the mortgagee; and no payment of principal or interest to him; and no acknowledgment of his title. In 1870, the mortgagee filed a bill for foreclosure, and he obtained a decree *nisi* in 1874, and a decree absolute in 1877. In 1878 he brought an

Real Property Limitation Act, 1874.

Provision for case of future estates (*l*).

Sect. 2. "A right to make an entry or distress, or to bring an action *or suit*, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion *or remainder, or other future estate or interest*, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land *or rent*, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent: but if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent."

Time limited to six years when person entitled to the particular estate out of possession, &c.

In cases of infancy, coverture, or lunacy, at the time when the right of action

Sect. 3. "If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter

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action to recover possession of the land: it was held that his right was not barred: *Pugh* v. *Heath*, 7 App. Cas. 235.

(*l*) The first part of this section re-enacts *verbatim* sect. 5 of 3 & 4 Will. 4, c. 27 (repealed by sect. 9 of this act), except as regards the words given in italics, which are here introduced for the first time. The latter part of the section is new.

mentioned, (that is to say,) infancy, coverture (*m*), idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years (as the case may be,) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened)."

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accrues, then six years to be allowed from the termination of the disability or previous death (*n*).

Sect. 4. "The time within which such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims."

No time to be allowed for absence beyond seas.

Sect. 5. "No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit to

Thirty years utmost allowance for disabilities (*o*).

(*m*) The effect of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), is to render coverture no longer a disability within the meaning of this act, so far as relates to property the title to which accrues after the 31st of December, 1882.

(*n*) This and the following section are substituted for sect. 16 of 3 & 4 Will. 4, c. 27 (repealed by sect. 9 of this act), the period of limitation after termination of the liability being reduced from ten to six years, and absence beyond seas being excluded from the causes of disability.

"Where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; and if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since the person was last heard of:" *Per* Denman, C. J., in *Nepean* v *Doe*, 2 M. & W. at p. 910; *S. C.* 2 Sm. L. C. 584. See also *R.* v. *Inhabitants of Harborne*, 2 A. & E. 540; 4 N. & M. 341; *Reg.* v. *Lumley*, L. R., 1 C. C. R. 196; *Re Lewes' Trusts*, L. R., 6 Ch. 356; *Re Walker*, L. R., 7 Ch. 120; *Hickman* v. *Upsall*, 4 Ch. D. 144.

This saving clause applies to cases where there is a continuous succession of disabilities. A., whose title accrued in 1833, during her infancy, married while still a minor, and continued under coverture until 1870; it was held that an action then brought by her and her husband was maintainable: *Borrows* v. *Ellison*, L. R., 6 Ex. 129.

(*o*) This section re-enacts sect. 17 of 3 & 4 Will. 4, c. 27 (repealed by sect. 9 of this act), substituting thirty and six years for forty and ten years respectively.

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recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such *thirty* years, or although the term of *six* years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired (*o*).

In case of possession under an assurance by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twelve years after that period, at which the assurance, if then executed, would have barred them (*p*).

Sect. 6. "When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession, or from the last written ac-

Sect. 7. "When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any *action* or suit to redeem the mortgage, but within *twelve* years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of

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(*o*) The disability of one coparcener is no protection to the other: *Roe* d. *Langdon* v. *Rowlston*, 2 Tau. 441.

(*p*) This section re-enacts sect. 23 of 3 & 4 Will. 4, c. 27 (repealed by sect. 9 of this act), merely substituting twelve for twenty years.

This section applies only to assurances which effectually bar the issue in tail (*Penny* v. *Allen*, 7 De G., M. & G. 409); and was held not to apply to the case of a conveyance by a settlor executed under a mistake as to his rights and not inrolled: *Morgan* v. *Morgan*, L. R., 10 Eq. 99; see also *Mills* v. *Capel*, L. R., 20 Eq. 692.

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knowledgment (*q*).

the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such *action* or suit shall be brought but within *twelve* years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage-money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage-money which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage" (*r*).

(*q*) This section re-enacts sect. 28 of 3 & 4 Will. 4, c. 27 (repealed by sect. 9 of this act), substituting twelve for twenty years. The words in italics are new.

(*r*) A trust for sale of land by way of security for a loan is a mortgage within the meaning of this section: *Locking* v. *Parker*, L. R., 8 Ch. 30; see also *Re Alison*, *Johnson* v. *Mounsey*, 11 Ch. D. 284. As to acknowledgment of a mortgagor's title after his bankruptcy, see *Markwick* v. *Hardingham*, 15 Ch. D. 339. The old rule that no lapse of time barred the right of redemption of the whole of the mortgaged lands, so long as the mortgagors retained possession of a part, was abolished by sect. 28 of 3 & 4 Will. 4, c. 27. See *Kinsman* v. *Rouse*, 17 Ch. D. 104.

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Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime (*s*).

Sect. 8. "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage (*t*), judgment (*u*), or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within *twelve* years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

Act to be read with 3 & 4 Will. 4, c. 27, of which certain parts are repealed, and other parts to be

Sect. 9. "From and after the commencement of this act all the provisions of the act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this act, and shall

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The lapse of twelve years from the time when a mortgagee takes possession constitutes an absolute bar to redemption, and is not extendible by reason of a mortgagor's disability: *Forster* v. *Patterson*, 17 Ch. D. 132.

(*s*) This section re-enacts sect. 40 of 3 & 4 Will. 4, c. 27 (repealed by sect. 9 of this act), substituting twelve for twenty years. It applies to legacies payable out of personal estate only: *Sheppard* v. *Duke*, 9 Sim. 569; *Piggott* v. *Jefferson*, 12 Sim. 569.

(*t*) An action on the covenant contained in a mortgage deed or on the collateral bond is within this section: *Doe* d. *Jones* v. *Williams*, 5 A. & E. 291; *Sheppard* v. *Duke*, 9 Sim. 567; *Sutton* v. *Sutton*, 22 Ch. D. 511; *Fearnside* v. *Flint*, 22 Ch. D. 579. Payment by a tenant of a mortgagor to a mortgagee, without the mortgagor's authority, is sufficient to keep alive the mortgagee's right to foreclose: *Harlock* v. *Ashberry*, 18 Ch. D. 229.

(*u*) See *Grenfell* v. *Girdlestone*, 2 Y. & C. Ex. 662. In *Berrington* v. *Evans* (1 Y. & C. Ex. 434), it was held that a judgment creditor's claim had not been kept alive by the subsistence of a creditor's suit, under which he had not proved during twenty years. See as to judgments, *infra*, sub tit. MORTGAGES; and see *Murphy* v. *Stone*, 1 Dr. & Walsh, 236; *Peyton* v. *M'Dermott*, ib. at p. 211; *Berrington* v. *Evans*, 1 Y. 276; *Sterndale* v. *Hankinson*, 1 Sim. 393; *Watson* v. *Birch*, 15 Sim. 523. A vendor's lien for unpaid purchase-money is within this section, and not being an "express trust" within sect. 25, claims to recover the same will be barred in twelve years: *Toft* v. *Stephenson*, 7 Ha. 1; *S. C.* 1 De G., M. & G. 28; see as to when the time begins to run, *S. C.* 5 De G., M. & G. 735.

take effect as if the provisions hereinbefore contained were substituted in such act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years in the section of the said act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this act, as if the period of twelve years had been therein mentioned, instead of the period of twenty years."

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read with reference to alterations by this act.

7 Will. 4 & 1 Vict. c. 28, to be read with this act.

Sect. 10. "After the commencement of this act, no action, suit, or other proceeding, shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust" (*x*).

Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same.

Sect. 11. "This act may be cited as 'The Real Property Limitation Act, 1874.'"

Short title.

Sect. 12. "This act shall commence and come into operation on the first day of January, 1879."

Commencement of act.

The effect of the two statutes is to give a parliamentary title to land to the person in possession (except in special cases) after the expiration of twelve years from the commencement of his possession. See *Doe* d. *Jukes* v. *Sumner*, 14 M. & W. 39.

General effect and scope of the statutes 3 & 4 Will. 4, c. 27 and 37 & 38 Vict. c. 57.

The general scope of the statutes seem to be confined to real estate, and whether the 40th section of the Act of Will. 4 (*y*) applied at all to the recovery of legacies not charged upon land has

(*x*) This section abolishes the old distinction between a charge of debts and an express trust to pay debts: *Fearnside* v. *Flint*, 22 Ch. D. 579.

(*y*) This section (repealed by sect. 9 of this act) is now virtually re-enacted by sect. 8 of the Act of 1874, *vide ante*, p. 28.

Statutes of Limitations.

Legacies within the act.

been doubted (Sugd. Vend. 488; *Campbell* v. *Sandford*, 8 Bligh, 622); but it has been decided that a suit to recover money from an executor, to whom it had been bequeathed upon certain trusts, and who had severed it from the testator's general estate, and applied the interest for some time upon the trusts of the will, was not a suit "to recover" a legacy within that clause, but a suit to compel a party to account for a breach of trust. So long as the executor leaves a particular legacy confounded with the general estate, so long is he answerable for that legacy in his character of executor. As soon as he has separated and appropriated it to its particular object, he becomes a trustee in respect of it; and the clause solely applies, if at all, to a suit against the executor *quà* executor: *Phillipo* v. *Munnings*, 2 My. & C. 309.

What suits against executors not within the act.

Limitation where there is a previous life interest in the legacy.

In the case of *Prior* v. *Hornblow* (2 Y. & C. Ex. 200), Alderson, B., decided, that a bequest of residuary personalty was within the act, but that time did not begin to run against a legatee of a capital sum during the continuance of a life interest in that sum given to a third person. In a more recent case, it was held, that a claim to a legacy was within the 40th section: *Sheppard* v. *Duke*, 9 Sim. 567. See also *Henry* v. *Smith*, 2 Dr. & W. 381, 391; *Piggott* v. *Jefferson*, 12 Sim. 26.

Limitation with reference to foreign law.

It may be here observed (with reference to legacies given by a foreign will, &c.), that the law of limitation relates "*ad ordinationem litis*;" it, therefore, is governed by the law of the country in which the suit is brought, although the decision as to the subject-matter may be regulated by a foreign law: *Huber* v. *Steiner*, 2 Scott, 304; *Don* v. *Lippmann*, 5 Cl. & F. 1.

When possession commences to be adverse.

To the application of the 2nd section (*z*), which fixes generally the period of twenty [now twelve] years from the time when the right shall have first accrued to the person claiming to exercise it, or to

(*z*) Though this section is repealed by sect. 9 of 37 & 38 Vict. c. 57, it is re-enacted almost *verbatim* by sect. 1 of that act, *ante*, p. 23, and the earlier decisions are therefore still in force.

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some person through whom he claims, the subsequent sections have annexed several qualifications and exceptions. The right to enter in respect of an estate in remainder or reversion first accrues at the moment of the determination of the next preceding estate, and the remainderman or reversioner has twelve years from that time, except in the cases where his right is expectant upon the determination of a tenancy at will, from year to year, for years in certain cases, or in tail.

Tenancy at will.

1. Where a tenant at will is in possession, the right of the landlord first accrues either at the determination of such tenancy, *or* at the expiration of one year next after its commencement, *at which time such tenancy is deemed to have determined.* (Sect. 7.) A tenancy at will is determined at common law by the death either of the lessor or of the lessee; but if such death happen after the expiration of one year from the commencement of the tenancy, it is not to be treated as a determination of the tenancy for the purposes of the act; for, by the effect of the words in italics, the tenancy will have been previously at an end.

Effect of change of occupation after adverse possession has commenced.

At the moment of the determination of the tenancy, by whatever means, the possession begins to be adverse, and continues to be adverse until the true owner recovers actual possession, or obtains a sufficient acknowledgment of title under the 14th section; from that moment, the character of the possession, or whether it remains in the same person, is immaterial—it is equally adverse to the true owner. "We are all clearly of opinion, that the second and third sections have done away with the doctrine of non-adverse possession, and, except in cases falling within the 15th section of the act, the question is, whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession:" *Per* Lord Denman, C. J., *Nepean* v. *Doe* d. *Knight*, 2 M. & W. 894, 911. No conveyance or devise, or other attempt by the true owner to deal with the property, will avail, unless he obtains either an actual or a virtual possession in the manner pointed out by the act.

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Adverse possession by *cestui que trust* against trustee.

Mortgagors and *cestuis que trust* are expressly excluded from the operation of the 7th section. The case of a mortgagor in possession is regulated by the stat. 7 Will. 4 & 1 Vict. c. 28, *ante*, p. 21.

On the creation of an express trust, the *cestui que trust*, if his possession or receipt of the profits is consistent with the trust, becomes tenant at will to his trustee; and, as such, cannot be turned out of possession without a previous demand of possession: Co. Litt. 55 b; 3 Hale, MS.; *Right* v. *Beard*, 13 East, 210; *Doe* d. *Newby* v. *Jackson*, 1 B. & C. 448; *Doe* d. *Jones* v. *Jones*, 10 B. & C. 718; *Roe* d. *Blair* v. *Street*, 4 Nev. & M. 42.

Possession of the *cestui que trust* would commence to be adverse from the moment of the will being determined on either side, as, upon notice to quit being given by the trustee, or the legal estate being conveyed without any recognition of the trust, or if the *cestui que trust* were to act or claim in a manner inconsistent with the trust. The question in every case (often, no doubt, of difficult determination), would be whether there was a tenancy at will subsisting or not. See *Keene* v. *Deardon*, 8 East, 248; *Earl of Portsmouth* v. *Lord Effingham*, 1 Ves. sen. 435; *Harmwood* v. *Oglander*, 8 Ves. 131; *Cholmondeley* v. *Clinton*, 2 Mer. 260.

The provision contained in sect. 7 of the stat. 3 & 4 Will. 4, c. 27, with regard to a *cestui que trust* is applicable only to express trusts, although the words "express trust" do not occur in the section: *Doe* d. *Stanway* v. *Rock*, 4 M. & Gr. 30. But where A. entered into an agreement for a lease with the trustees of D., and occupied the premises under the agreement and paid no rent for more than twenty years, it was held that the trust between the trustees of D., as owners of the fee, and A., was a direct trust, and was not barred by lapse of time: *Drummond* v. *Sant*, L. R., 6 Q. B. 763.

Tenant from year to year, &c.

2. In the case of a possession as tenant "from year to year or other period" *without writing*, the determination of the first of such years or other periods, or the last time when any rent payable in respect of such tenancy shall have been received, is

the commencement of adverse possession. (Sect. 8.) Therefore, if rent due in respect of any year's occupation is paid six years after it became due, the period is computed from the time of such payment, although no rent is paid in respect of any of the intermediate years. Statutes of Limitations.

3. When the possession is under a lease *in writing*, reserving a yearly rent of twenty shillings or upwards, the period may commence before the determination of the term, viz., at the time when rent shall have been first received by some person wrongfully claiming it as the immediate reversioner, provided no subsequent payment has been made to the true owner. (Sect. 9.) And the landlord is barred for the benefit not of the tenant, but of the person so wrongfully receiving the rent. (Sect. 35.) Lease in writing.

Where the possession is under a lease in writing, by which no pecuniary rent to the amount of twenty shillings a-year is reserved, neither the 8th nor the 9th section applies, and the possession does not commence to be adverse until the regular determination of the tenancy. Possession under a valid *parol* lease (which cannot be for a longer period than three years), is governed by the 8th section. If the parol lease is invalid, a tenancy at will arises in the first instance, which is enlarged into a yearly tenancy on payment of rent (*infra*, tit. Leases). And mere discontinuance of the receipt of rent, under a lease within the 9th section, does not operate as a bar; there must be a wrongful receipt by another person: *Doe* d. *Davy* v. *Oxenham*, 7 M. & W. 131; *Chadwick* v. *Broadwood*, 3 Beav. 308.

4. Previously to the statute, possession adverse to the issue in tail did not commence to be adverse to a remainderman or reversioner expectant on the estate tail, until, by failure of issue in tail, the estate of such remainderman or reversioner fell into possession. But now, by sections 21 and 22, as soon as time commences to run against a tenant in tail, it commences to run also against all those whom such tenant in tail might have barred, whether the tenant in tail lives during the whole period of limitation or not. Estates tail.

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Defective assurance by tenant in tail.

If the possession has been obtained under an assurance by the tenant in tail, which is not sufficient to bar the issue, though purporting to pass the fee, it does not commence to be adverse under the last-mentioned clauses, until the death of the grantor, from which time the period of limitation begins to run. And if the possession has been obtained under an assurance that has only passed a base fee, the possession would not, under the clauses, be adverse, so long as there was in existence issue inheritable under the entail.

The 23rd section in effect enacts, that possession under any assurance by tenant in tail, inoperative against those in remainder or reversion, (or, after such possession has once been had, possession by any person not entitled in respect of any interest expectant on the estate tail,) shall commence to be adverse to those in remainder or reversion, as soon as (but for such assurance) *a like assurance*, executed by the tenant in tail for the time being, would, without the consent of any other person, have barred them.

The assurance contemplated by this clause is such an assurance as would, if made by a tenant in tail in possession, operate to bar the issue and remaindermen (*a*).

Whether the 23rd section is retrospective.

There is nothing in the nature of the enactment contained in this clause which affords any reason for excluding assurances previously made from its operation; nor do the somewhat loose terms in which it is expressed, seem necessarily to require such exclusion. Lord St. Leonards, however, expressed a decided opinion against the retrospective operation of this clause: Sugd. Vend. 483. See also *Penny* v. *Allen*, 7 De G., M. & G. 409. This question is not now of any great practical importance.

Defective assurances made by tenant in tail after the abolition of fines and recoveries.

In cases of defective assurances made subsequently to the act abolishing fines and recoveries, there can be no difficulty: if the assurance fails as a bar for want of enrolment, or other inherent defect, the 23rd section does not apply, and the time does not run until the grantor's death, (unless the assurance failed even of passing the freehold,)

(*a*) See *Morgan* v. *Morgan*, L. R., 10 Eq. 99.

when the possession, being in right of a mere tenancy at will, would commence to be adverse at the time indicated by the 7th section. If the assurance fails for want of the consent of the protector, the time commences at the moment when the office of protector has ceased, provided, of course, the tenant in tail for the time being is not then under disability; for the 23rd clause contains, not in express words, but by necessary consequence, a saving of disabilities, independently of the other clauses specially enacted for that purpose (*b*). Statutes of Limitations.

A difficulty is thrown upon the remainderman or reversioner where the tenant for life has died, or is presumed to have died, abroad, no tidings having been heard of him. At common law, a person who had not been heard of for seven years was presumed to have died (*Thorne* v. *Rolff*, Dy. 185); and the statute 19 Car. 2, c. 6, set out below (sub tit. LEASES), enacted, that in any action by a reversioner, in the several cases therein mentioned, the death of the tenant for life, or *cestui que vie*, should be presumed after absence for seven years, unless the contrary were proved. The same period was adopted in the statute *De Bigamis*, 1 Jac. 1, c. 11; and in analogy to this statute, the rule has been adopted in the courts, of presuming all persons to be dead who have not been heard of during seven years: *Doe* d. *George* v. *Jesson*, 6 East, 80; *Hopewell* v. *De Pinna*, 2 Camp. 113; *Doe* d. *Lloyd* v. *Deakin*, 4 B. & Ald. 433; but see *Rex* v. *Harborne*, 4 Nev. & M. 341 (*c*). Until the end of seven years, therefore, the reversioner or As to presuming the death of tenant for life.

(*b*) Lord St. Leonards is of opinion that base fees created before the act by the tenant in tail in possession are unassailable, the remedy of the remainderman being taken away by the 36th section, which abolishes real actions: Sugd. Vend. 484.

(*c*) Where Lord Denman, C. J., said, "It appears to me, that nothing could be more absurd than that there should be a presumption of life, or death without reference to the age, circumstances, situation of life, and common habits of the party. Can there be the same presumption as to a party who is 100, and to one who is 35—as to a party who was in good health, and one who was proved to have then had a disorder upon him which was likely speedily to terminate in his death? It is altogether a question of fact:" p. 344.

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Presumption of death.

remainderman, unless he can *prove* the death of the particular tenant, is not in a condition to sue. The lessor of the plaintiff in ejectment must also prove that he sues in time; that is, he must prove that the tenant for life was in existence within twenty [now twelve] years preceding the action. If he relies upon the presumption above mentioned, to prove that the *cestui que vie* died during some part of the seven years, he is not entitled to have it presumed that he was alive at any time during the seven years; least of all, that he survived to the end of that period; in other words, there is no presumption that a party was alive at any time. "The presumption of law relates only to the *fact* of death, and the *time* of death, whenever it is material, must be a subject of distinct proof:" *Nepean* v. *Doe* d. *Knight*, 2 M. & W. 894, 910. It may now be regarded as well established that if a person has not been heard of for seven years he will be presumed to be dead (*b*); but that, *in the absence of special circumstances*, the time of death is not a matter of presumption. The person upon whom it rests to prove either that a person was alive or that he was dead at a particular period, must establish the fact by direct evidence: *Lamb* v. *Orton*, 6 Jur., N. S. 61; *Re Phene's Trusts*, L. R., 5 Ch. 139; *Re Lewis's Trusts*, L. R., 6 Ch. 356; *Re Corbishley's Trusts*, 14 Ch. D. 846. As to presuming, from special circumstances, that death took place at a particular time, see *Watson* v. *Knight*, 1 Stark. 121; *Dixon* v. *Dixon*, 3 B. C. C. 509; *Mason* v. *Mason*, 1 Mer. 308; *Ommaney* v. *Stillwell*, 23 Beav. 328; *Re Beasney's Trusts*, L. R., 7 Eq. 498; *Hickman* v. *Upsall*, 4 Ch. D. 144. Where a husband and his wife were drowned by the same accident, there was no presumption that the husband survived so as to entitle his next of kin to the wife's property: *Satterthwaite* v. *Powell*, 1 Curt. 705; see also *Wing* v. *Angrave*, 8 H. L. 183.

(*b*) Although, however, after seven years' absence without tidings the death of a person may, for many purposes be presumed as between adverse litigants, a conveyancer could not rely upon such a presumption in a question of title as between vendor and purchaser. See Sugden, Vend. 418.

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Sect. 3. Right of entry, when deemed to have first accrued.

The 3rd section is devoted to the purpose of explaining at what time, under various circumstances, the right to enter, distrain, or sue, is to be deemed to have first accrued. The cases included within this section are divided into five classes:—

1. When possession has been discontinued.

1st. When the person claiming, or some one through whom he claims, having been in possession or receipt of the profits, shall have been *dispossessed*, or have discontinued such possession or receipt; in which case the right is to be deemed to have first accrued at the time of such dispossession or discontinuance.

The effect which actual ouster formerly produced, is now, therefore, attributed to a mere discontinuance of possession, and if the party in possession at any time can show that, throughout the period required by the statute, the possession has been either vacant, or not rightfully enjoyed, he has a complete answer to the claim of the original owner.

Adverse possession against married women.

The application of this clause to the circumstances attending the title of a married woman to the inheritance, seems to involve some difficulty. In a case which came before the Court of Queen's Bench, the facts were these:—A feme sole in possession of an estate in fee simple married John Corby, in the year 1772, by whom she had a son. After occupying the premises for a few years, they removed to another part of the country. In 1828 Mrs. Corby died, and her husband died in 1832. The action was brought by the son more than forty years after the abandonment of possession (the circumstances attending which did not appear). It was contended, that the husband being entitled by the curtesy, up to the time of his death, in 1832, the son's right did not accrue until that period, the case falling within the 5th section; but the action was held to have been barred by the 17th section: *Doe* d. *Corby* v. *Branson*, 4 Nev. & M. 664: *S. C.* nom. *Doe* d. *Corbyn* v. *Bramston*, 3 A. & E. 63.

Remarks on *Doe* d. *Corbyn* v. *Branson*.

This decision appears to be open to observation. To pass over the preliminary objection, that no inquiry seems to have been made whether the possession was adverse at the time of the passing of

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the act, and therefore whether the 15th section did not apply (the action was commenced in 1835), it is to be observed, that the judgment of the court was founded on the 17th section, which has for its object merely to prevent the period of limitation from being extended *by disabilities* beyond the period of forty years. In the case before the court there was no disability in question. On the birth of the son the husband had become tenant by the curtesy for his own life and *in his own right* (*c*), during which time neither the wife nor her heir could be entitled to enter, and this occurred before the commencement of the adverse tenancy. After the birth of issue and during her husband's life, therefore, the wife was not under disability within the 16th and 17th sections, because she had no right to make an entry, &c. See Bac. Ab. *Curtesy* (E); 2nd Inst. 301, 309. The wife's title having first accrued to her son in possession on the death of the husband, the case comes within the protection of the 5th section, which gives the reversioner a new right on the determination of the particular estate, although he, or one through whom he claims, was formerly in possession.

When a husband and wife join in conveying land of which she is seised in fee by a deed, which for want of a fine (or statutory acknowledgment) is not binding on her, time will not run against her until her husband's interest which passed by the conveyance determines, *i.e.*, from the death of the

Estate by the curtesy.

(*c*) "After issue had he shall do homage alone, and is become tenant to the lord; and the avowry shall be made only upon the husband in the life of the wife. * * * * And it is adjudged in 29 Edw. 3, that the tenant by the curtesie cannot claim by a devise, and waive the state of his tenancy by the curtesie, because, saith the book, the freehold commenced in him before the devise for term of his life."—1st Inst. 30 a. And this account of the estate by the curtesy is confirmed by the rule as to estates tail before the Statute de Donis. Such estates could not be aliened until the birth of issue in tail; and if the donee neglected to exercise his power during the life of the issue, and the issue died, he could no longer aliene. But if a feme tenant in tail special, had issue in tail, though she survived her husband, the estate was absolutely free from the condition, the husband's estate by the curtesy initiate being regarded as alienation for his life: *Nevil's case*, 7 Rep. 62; *Payne's case*, 8 Rep. 35.

husband (if there is heritable issue) or from her death in his lifetime, if there be none: *Jumpson* v. *Pitchers*, 13 Sim. 327, and see Dart, V. & P. p. 388. Statutes of Limitations.

2nd. When the claim is made to the estate or interest of some person who died in possession or receipt of the profits, or of the rent, and was the last person entitled who had such possession or receipt, the right is deemed to have first accrued on the death of such person. This clause would apply to the case of an heir excluded from his inheritance by abatement, and, it should seem, to a devisee of the fee (who is *hæres factus*, and claims the estate of the testator). But a devisee of a particular estate or of a rent-charge cannot properly be said to claim "the estate or interest" of the testator; and, as we shall see presently, his case does not come within the section under consideration. 2. Abatement. Devisee.

3rd. When the title is derived from an instrument (*not being a will*), made by a person in possession, &c., *in respect of the same estate or interest*, and no possession has ever been had under the instrument, the right accrues at the time indicated by the instrument. The case of a mortgagee who has allowed the mortgagor to retain possession, which comes within the letter of this clause, has been excepted by a later statute, stated *ante*, p. 21. 3. Title by alienation *inter vivos*.

The effect of the words, "in respect of the *same* estate or interest" is not very clear; they would seem to confine this part of the 3rd section to cases of absolute alienation of the entire interest of the grantor, and to exclude grants of particular estates or rents *de novo;* and this is the construction which was suggested by Lord C. J. Tindal, in delivering the judgment of the court in the case of *James* v. *Salter*, 4 Scott, at p. 180. Since it has been decided that all cases not falling within the 3rd section are governed by the 2nd, the point is only interesting for the purpose of accounting for the incompleteness of the enumeration contained in the 3rd section. What cases are not within the 3rd section.

4th. Where the claim is made in respect of an interest, which was originally an interest in remainder or reversion, or other future interest, and under 4. Future interests.

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which no possession has ever been had, the right is deemed to have accrued when it first fell into possession, by the natural determination of the particular estate, and not (sect. 4) by forfeiture or breach of condition. *Vide ante*, p. 10.

5. Forfeiture.

5th. Where the claim is founded on a forfeiture or breach of condition the right is deemed to have accrued on such forfeiture, or breach.

Receipt of rent.

What shall be deemed adverse possession in particular cases is, for further certainty, ascertained by some additional clauses. The receipt of rent from a tenant from year to year, or other lessee, is to be deemed the receipt of the profits (sect. 35) (*d*). And the receipt of a different rent from that reserved by the lease would, of course, be sufficient under this clause, upon the presumption, that a new arrangement respecting the rent had been entered into. (See observations as to leases, *ante*, p. 33.)

Entry or continual claim.

A mere entry or continual claim is not sufficient to keep alive the right. (Sects. 10, 11.)

Possession of coparcener, &c.

The possession of a coparcener, joint-tenant, or tenant in common, for the benefit of himself or any other person than his coparcener, &c., is adverse (sect. 12); and the possession of a younger brother, or other relation of the heir, is also adverse to the heir. (Sect. 13.)

Administrators and executors.

Possession commences to be adverse to an administrator from the time of the death of the person whose effects he claims, however distant may be the time at which the administration is granted. An administrator, of course, cannot be under disability *ab initio*, but an executor may (stat. 38 Geo. 3, c. 87); and would be entitled, it is presumed, to the usual allowance; but if an executor died under disability and intestate, it seems that the administrator *de bonis non*, &c., could not claim the benefit of the provision for disability.

Disabilities.

Where the rightful owner at the time when adverse possession commences is under disability, a further

(*d*) Where a solicitor pays off a mortgage debt due by his client, and receives the rent, he must be taken to be acting as his client's agent, and the statute will not run against the client: *Ward* v. *Carttar*, L. R., 1 Eq. 29.

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period of [six] years is allowed from the death of such person, or the termination of his disability, whichever first happens; but no time is allowed in respect of any new disability that may supervene, after there has once been adverse possession against the true owner, while under no disability. And no further time is given in respect of any disability of the next claimant, in case the person entitled when the adverse possession commenced died under disability. (Sects. 16, 18.) The rule was different under the Statute of James, which allowed a succession of disabilities (*Cotterell* v. *Dutton*, 4 Taunt. 826), though time could not be stopped after it had once commenced running: *Doe* v. *Jones*, 4 T. R. 300. And no duration of disabilities is to keep alive a right beyond the period of [thirty] years from the time when such right first accrued. (Sects. 17, 18.) As to these provisions, see some remarks, *ante*, pp. 37, 38.

Limitation of claims in equity.

The limitation of equitable claims was not formerly regulated by any enactment, but only by a rule adopted by courts of equity, in analogy to that by which rights of entry were then bound: *Denys* v. *Shuckburgh*, 4 Y. & C. Ex. 42, 53. The Statute of Limitations for the first time supplied a strict legislative bar to the enforcement of equitable rights, corresponding with the rule as to rights at law. (Sect. 24.)

The words express trusts in sect. 25 are used by way of opposition to trusts arising by implication, trusts resulting on trusts of operation of law. Two things combine here, there must be a trustee with an express trust, and an estate or interest in lands vested in the trustee, and which, therefore, the trusts must affect: *Per* Westbury, C., in *Dickenson* v. *Teasdale*, 1 De G., J. & S. 52, 59.

A mortgage of land by way of trust for sale is not an "express trust." See *Locking* v. *Parker*, L. R., 8 Ch. 30; *Re Alison*, *Johnson* v. *Mounsey*, 11 Ch. D. 284; *Warner* v. *Jacob*, 20 Ch. D. 220.

Formerly a distinction was drawn between a charge of debts and an express trust to pay them; but this is now abolished by sect. 10 of the Act of 1874; the statute will now run notwithstanding a

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declaration that trustees should hold proceeds of sale of land upon trust to pay testator's debts. See *Fearnside* v. *Flint*, 22 Ch. D. 579. A vendor's lien is not an "express trust": *Toft* v. *Stevenson*, 7 Ha. 1; 1 De G., M. & G. 28; *Henderson* v. *Atkins*, 7 W. R. 387; 28 L. J., Ch. 913.

A direction to trustees to pay debts, followed by a devise to them, subject thereto, upon trusts declared in the will, is an "express trust": *Hunt* v. *Bateman*, 10 Ir. Eq. R. 360. So also a devise on trust for sale with a direction that the proceeds were to be deemed personalty: *Mutlow* v. *Bigg*, L. R., 18 Eq. 246.

By the Judicature Act, 1873, sect. 25 (2), it is enacted that, "No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." This applies equally to real and personal estate: *Banner* v. *Berridge*, 18 Ch. D. 254.

The rule that a trust is not barred does not apply as between two co-*cestuis que trust* (*Lister* v. *Pickford*, 11 Jur., N. S. 649; *Knight* v. *Bowyer*, 23 Beav. 609; *S. C.* 2 De G. & Jo. 421); nor as regards a claim by a stranger: *Llewellyn* v. *Mackworth*, Barnard, 445.

An executory trust has been held not to be within the section: *Stewart* v. *Marquis of Conyngham*, 1 Ir. Ch. R. 534.

Where a *cestui que trust* would be barred if his title was legal, the trustee is also barred: *Doe* d. *Steinway* v. *Rock*, 4 M. & Gr. 30; *Melling* v. *Leak*, 16 C. B. 652; *S. C.* 24 L. J., C. P. 187.

Express trusts.

In cases of *express* trusts, the right is to be deemed to have first accrued "at and not before" the time when a conveyance shall have been made to a purchaser for value; and then only as against such purchaser, and those claiming under him (*e*). The

Charitable trusts.

(*e*) The clause is not very consistent in its terms: the right to bring a suit "against *the trustee*, or any person claiming through him," is to be deemed to have first accrued at the time of a conveyance to a purchaser, and then only as against *the pur-*

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rule in equity was formerly the same, with one exception; it having been decided that length of time would not protect a purchaser with notice of charitable trusts: *Att.-Gen.* v. *Christ's Hospital*, 3 My. & K. 344. And in the earlier decisions after the statute it was doubted whether the old rule was not still to prevail (*Incorporated Society* v. *Richards*, 1 Dr. & W. at p. 287; *Att.-Gen.* v. *Parsse*, 2 Dr. & W. 69); but it is now settled that charities are within the rule that no equitable claim can be made after the time when a claim at law would have been barred prior to the statute. (Sect. 24.) See *Att.-Gen.* v. *Davey*, 4 De G. & J. 136 (reversing the decision of Romilly, M. R., reported in 19 Beav. 521). As to eleemosynary corporations sole, see sect. 29, *supra*, p. 16. Generally, however, charity estates are held upon express trusts, and therefore are within the saving clauses contained in sect. 25: Sugd. Vend. 585. See also *Commissioners of Donations* v. *Wybrants*, 2 Jo. & L. 182; *Att.-Gen.* v. *Magdalen College, Oxford*, 6 H. L. 189.

Cases of concealed fraud.

In cases of concealed fraud, the right to sue is to be deemed to have first accrued at the time when such fraud shall, or, with reasonable diligence, might (*Denys* v. *Shuckburgh*, 4 Y. & C. 42, 53) have been first known or discovered. See also *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319. But this extension of the period is not to prejudice purchasers for value without notice. (Sect. 26.) Adverse possession which would bar a trustee, if he united the legal and beneficial possession in his own person, will not be rendered the less effectual by the circumstance that the equitable ownership subsists in a

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chaser and those claiming through him. It may be an important question upon this section, whether the words, "any person claiming through" the trustee, apply exclusively to those claiming the *legal* estate, or whether they would include a person wrongfully exercising a beneficial dominion over the property with the consent (whether given under mistake or otherwise) of the trustee. There seems to be good ground for contending that the former is the true meaning, and that the words do not apply to an enjoyment with the trustee's permission, under circumstances similar to those which occurred in the case of *Cholmondeley* v. *Clinton*, 4 Bli. 1.

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different person: *Llewellyn* v. *Mackworth*, Barnard, 445; *Hopkins* v. *Hopkins*, 1 Atk. 580.

Concealed fraud.

Concealed fraud within this section does not mean merely entering wrongfully without the owner's knowledge that adverse possession has arisen (see *Rains* v. *Buxton*, 14 Ch. D. 437); it means designed fraud, where a person knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment, enables himself to enter and hold. See Sugd. Vend. 485. See further as to what constitutes concealed fraud within the meaning of this section, *Petre* v. *Petre*, 1 Dr. 397; *Dean* v. *Thwaite*, 21 Beav. 621; *Thurston* v. *Ansty*, 27 Beav. 335; *Sturgis* v. *Morse*, 24 Beav. 541; *Manby* v. *Bewicke*, 3 K. & J. 342; *Chetham* v. *Hoare*, L. R., 9 Eq. 571; *Willis* v. *Earl Howe*, 50 L. J., Ch. 4; *S. C.* 29 W. R. 70. A purchaser, not having personal notice of the fraud, who contracts through an agent who knows of the fraud, is not protected by the section: *Vane* v. *Vane*, L. R., 8 Ch. 383.

The effect of the 28th section, respecting mortgagees, will be considered in a subsequent volume, sub. tit. MORTGAGES.

Express trusts.

The decision in *Cholmondeley* v. *Clinton* (4 Bligh, 1), that there might be adverse enjoyment of an equity of redemption, which is a species of equitable interest arising by implication, applies equally to other cases of implied (*Collard* v. *Hare*, 2 R. & My. 675) and also to *express* trusts.

No statutory bar between express trustee and *cestui que trust*.

In cases of implied trusts the 24th section operates; but where the trust is express, the statute, it has been seen, creates no inflexible bar to the remedies of the *cestui que trust* against the trustee and volunteers claiming under him; and equity (which may shorten, though it may never add to the time allowed by the statute) will exercise its discretion, and determine from the particular circumstances in each case, whether or not the *cestui que trust* has been guilty of such laches as should preclude him from relief: *Smith* v. *Clay*, 3 B. C. C. 639; *Pickering* v. *Lord Stamford*, 2 Ves. J. 581; *M'Donnell* v. *White*, 11 H. L. C. 570.

Remedy for breach of an express trust may be lost by laches.

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Upon the whole it appears that, excepting as to cases of mistake or ignorance (*Berrington* v. *Evans*, 1 Y. & C. Ex. 434; *Brooksbank* v. *Smith*, 2 Y. & C. Ex. 58; *Denys* v. *Shuckburgh*, 4 Y. & C. Ex. 42), legacies, charitable trusts, charges, and mortgages, the statute has made no alteration in the rules of limitation which equity had already adopted; and has left many subjects of equitable cognisance unprovided for. As to the lapse of time and circumstances which will induce the court to refuse its assistance, see *Wright* v. *Howard*, 1 Sim. & St. 190; *Pattison* v. *Hawkesworth*, 10 Beav. 375; *Sibbering* v. *Earl of Balcarres*, 3 De G. & Sm. 735; and the remarks of Lord St. Leonards in *Spackman* v. *Evans*, L. R., 3 H. L. 220.

Extinction of the *right and title.*

Rights *conferred* by the statute.

The effect of the 34th section, which enacts, that, at the expiration of the period of limitation, the right of the party in possession shall be extinguished, may not in all cases be of easy determination. Thus, if a tenant at will continues in possession for [eleven] years after the determination of his tenancy, and is then turned out of possession by a stranger, and the owner suffers another year to elapse without asserting his right, he will be deprived both of his remedy and his title. It should seem that the original wrong-doer would then be entitled to recover the land from the person who had turned him out; for the title must be in some person, and can only be, it should seem, in him whose act has deprived the true owner of it (*g*); but see the judgment in *Doe*

(*g*) Of course, if the wrong-doer has been in possession for twenty [now twelve] years, he has a *primâ facie* title: *Stocker* v. *Berny*, 1 Ld. Raym. 741; *Doe* d. *Danson* v. *Parke*, 4 A. & E. 816; *Doe* d. *Draper* v. *Lawley*, 3 Nev. & M. 331. In a case before the statute (*Doe* d. *Harding* v. *Cooke*, 5 Moo. & Pay. 181), the lessor of the plaintiff relied upon the undisturbed possession of himself and father during twenty-three years, and the defendant relied on a possession during ten years succeeding the twenty-three. The court decided in favour of the plaintiff. With regard to the nature of the title of the wrong-doer in possession, Mr. Hayes says, "The wrong-doer must be considered according to the principle of the old law as claiming generally, and therefore as claiming the absolute property (unless indeed he expressly qualify his claim), and the statute as merely diminishing from time to time the danger of eviction, till at length his originally precarious fee

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d. *Thompson* v. *Thompson*, 2 Nev. & P. 656; 6 A. & E. 721, which seems not to favour this view.

If the second wrongful claimant has originally come in under the first, of course he cannot dispute his title, and therefore may be turned out at any time within [twelve] years. See *Doe* d. *Willis* v. *Birchmore*, 9 A. & E. 662.

Other clauses in the act.

The remaining sections of the act, which have not been noticed in this review of its more important provisions, relate to the claims of an administrator (sect. 6); acknowledgment of title (sect. 14); claims by spiritual and eleemosynary corporations sole (sect. 29); advowsons (sects. 30, 31, 32, 33, which by sect. 44, do not affect benefices in Ireland); abolition of certain real and mixed actions (sects. 36, 37, 38); descent cast, discontinuance, and warranty (sect. 39); arrears of rent and interest (sect. 42); and spiritual courts (sect. 43). See the notes to the different sections of the act, *ante*.

St. 21 Jac. 1, c. 2.

The Crown.—The rule "*nullum tempus occurrit regi*," (Litt. sect. 178), was first materially circumscribed, and the enforcement of the rights of the Crown limited in point of time, by the stat. 21 Jac. 1, c. 2, to sixty years from the commencement of the session of Parliament in which the act was passed (see Co. Litt. 119 a, n.; 3 Inst. 188),—a limitation which gradually became less effectual, until the statute of the 9th Geo. 3, c. 16 (*h*), usually

St. 9 Geo. 3, c. 16, *Nullum Tempus* Act.

becomes, by the exclusion of every stronger claim, a firm inheritance:" 1 Hayes, Con. 270 (5th ed.); see also Dart, V. & P. 402, and 11 Jur., N. S. 151 (part 2). A person in possession of land even before he has acquired a title by virtue of the statute has a devisable interest (*Doe* v. *Jauncey*, 8 C. & P. 99; *Asher* v. *Whittock*, L. R., 1 Q. B. 1); and he may defend his possession against strangers other than the rightful owner: *Doe* v. *Dyball*, Mood. & M. 346.

(*h*) The provisions of this statute were extended to Ireland by stat. 48 Geo. 3, c. 47. It would seem that such a title may be forced on a purchaser: *Tuthill* v. *Rogers*, 1 J. & L. 36.

This statute is amended by the stat. 24 & 25 Vict. c. 62. Sect. 1 of this act enacts that "The Queen's Majesty, her heirs and successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises), which such person or persons, or his or their or any of their ancestors or predeces-

called the *Nullum Tempus* Act, was passed, which disables the Crown from suing for any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (*other than liberties or franchises*, or the revenues, issues, or profits thereof), by reason of any right or title which shall not have first accrued and grown within sixty years before the commencement of the suit; unless the Crown, or those through whom the Crown claims, "shall have been answered, by force and virtue of any such right or title to the same, the rents, revenues, issues, or profits thereof, or the rents, issues, or profits of any honour, manor, or other hereditament, whereof the premises in question shall

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sors, or those from, by, or whom they do or shall claim, have, or shall have held or enjoyed or taken the rents, revenues, issues, or profits thereof by the space of sixty years next before the filing, issuing or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued or commenced for recovering the same or in respect thereof, by reason only that the same manors, lands, tenements, rents, tithes, or hereditaments, or the rents, revenues, issues, or profits thereof, have or shall have been in charge to her Majesty or her predecessors or successors, or stood insuper of record, within the said space of sixty years, but that such having been in charge, and such stand insuper of record shall be, as against such person and persons, and all claiming by, from or under them or any of them, of no force and effect."

Sect. 2 enacts that the provisions of this act apply to actions by the Duke of Cornwall, and to provisions of 7 & 8 Vict. c. 105, and 23 & 24 Vict. c. 53.

Provision as to answering of rent, &c., to the Crown.

By sect. 3 the Crown shall not be held, for the purposes of the act of the ninth year of king George the third, to have been answered the rents, revenues, issues, or profits of any lands, manors, tenements, rents, tithes, or hereditaments, which shall have been held or enjoyed, or of which the rents, &c. shall have been taken, by any other persons or person, by the space of sixty years next before the filing, issuing or commencing of any such action, suit, bill, plaint, information, commission, or other suit or proceeding for recovering the same or in respect thereof, as in the said act is mentioned, by reason only of the same lands, manors, tenements, rents, tithes, or hereditaments having been part or parcel of any honour or manor or other hereditaments of which the rents, &c. shall have been answered to her Majesty or her predecessors or successors, or some other person under whom her Majesty hath or lawfully claimeth, or shall thereafter have or lawfully claim as aforesaid, or of any honour, manor or other hereditaments which shall have been duly in charge to her Majesty, her predecessors or successors, or stood insuper of record as aforesaid.

Sect. 4 preserves the right to reversionary interests.

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be part or parcel, within the said space of sixty years; or that the same shall have been duly in charge to his Majesty, or some of his progenitors, predecessors, or ancestors, heirs, or successors, or have or shall have stood insuper of record within the space of sixty years." The act then proceeds to give to adverse possessors for sixty years a title against the Crown and grantees under the Crown. Sects. 2 & 10 define what shall be held to be "being duly in charge;" as to which, see also *Attorney-General* v. *Lord Eardley*, 8 Price, 39; 1 Daniel, 271; *Attorney-General* v. *Maxwell*, 8 Price, 76, n. Sects. 3 & 4 provide for cases of reversions and remainders vested in the Crown. Sect. 5 enacts that manors, &c., so gained by adverse possession, shall be held of the Crown upon the same tenure as if they had been had by grants from the Crown; which, in effect, amounts to an exception of services due to the Crown from the operation of the act. Sects. 6, 7, 8, & 2, contain certain reservations and savings of rights.

What cases not within the act.

The effect of the exception of liberties and franchises from the operation of the act is, to leave the majority of cases unprovided for; because, there are scarcely any lands not parcel of an honour which remain in the Crown and continue in charge, and the terms of the act do not seem well adapted to include advowsons. As to presuming grants of advowsons from the Crown, see *Gibson* v. *Clark*, 1 Jac. & W. 159. As to tithes, the Crown is limited by the 2 & 3 Will. 4, c. 100, *infra*, p. 49.

Advowsons.

The commencement of suit is the issuing of process, and not the filing of the information: *Att.-Gen.* v. *Hall*, 11 Price, 760.

Stat. 21 Jac. 1, c. 14. Limitation of rights of grantees from the Crown.

By the stat. 21 Jac. 1, c. 14, s. 1, it is enacted "that whenever the King, &c., hath been or shall be out of possession by the space of twenty years, or shall not have taken the profits of land, &c., within the space of twenty years before any information of intrusion brought to recover the same, in every such case the defendant may plead the general issue, and shall not be pressed to plead specially; and that, in such cases, the defendant shall retain

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the possession he had at the time of the information exhibited, until the title be tried, found, or adjudged for the king." Upon this enactment it was held, that a purchaser of a manor, part of the demesnes of the Crown, from the Commissioners of Woods and Forests, under the stat. 37 Geo. 3, c. 97, s. 6, could not recover, in ejectment, a portion of the waste of the manor which had been inclosed by a subject, and enjoyed for more than twenty years previous to the purchase, although the rights of the Crown had not been barred. The Court was of opinion that the commissioners had not power to sell any part of the Crown land so situated: *Doe* d. *Wall* v. *Morris*, 2 Scott, 276.

Limitation against the Crown claiming through a subject.

The Crown claiming through a subject is bound by the Statute of Limitations, if the subject was barred before the title of the Crown commenced. This was decided upon an extent in aid, in the case of *Rex* v. *Morrall*, 6 Price, 24.

Modus decimandi Act, 2 & 3 Will. 4, c. 100. Royal Assent, 9th Aug., 1832.

The only statutes connected with this part of the subject which have yet to be noticed, are those relating to claims of *Modus Decimandi* and exemption from tithes. Of these the first is the statute 2 & 3 Will. 4, c. 100, intituled "An Act for shortening the time required in Claims of *Modus Decimandi*, or Exemption from or Discharge of Tithes" (*i*), which after reciting enacts,

What prescriptions and claims of *modus decimandi* to be valid in law.

"That all *prescriptions* and *claims* of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and, in cases of claim to exemption or discharge, showing the enjoyment of the land without payment or render

(*i*) This statute is not affected by the provisions of 3 & 4 Will. 4, c. 27. See *Dean of Ely* v. *Bliss*, 2 De G., M. & G. 459. A claim may still be set up to a *modus decimandi* from time immemorial. *Earl of Stamford* v. *Dunbar*, 13 M. & W. 822.

Limitation and Prescription: Modus decimandi.

of tithes, money or other matter in lieu thereof, for the full period of thirty years next before the time of such demand; unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity from the *modus* claimed, or, in case of claim to exemption or discharge, the render or payment of tithes or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render or *modus* was made or enjoyment had by some consent or agreement, expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence showing such payment or render of *modus* made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto (*k*): Provided always, that, if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of *modus* made or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing."

Proviso.

(*k*) As to the construction of this provision, see *Salkeld* v. *Johnston*, 1 Mac. & G. 242.

Limitation and Prescription: Modus decimandi.

Sect. 2. "That every composition for tithes which hath been made or confirmed by the decree of any Court of Equity in England in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law; and that no *modus*, exemption, or discharge, shall be deemed to be within the provisions of this act, unless such *modus*, exemption, or discharge, shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this Act."

What compositions for tithes shall be considered valid.

Sect. 3 is spent.

Sect. 4. Provides, "That this Act shall not extend or be applicable to any case where the tithes of any lands, tenements, or hereditaments, shall have been demised by deed for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender, or other determination of such demise or composition."

To what cases this act shall not extend.

Sects. 5 and 6 contain provisions as to the time during which lands shall be held by persons entitled to the tithes thereof to be excluded in the computation under this act; as also the time during which any person capable of resisting any claim shall be an infant, &c.

Sect. 7. [Repealed by stat. 42 & 43 Vict. c. 59.]

Sect. 8. "That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim."

No presumption allowed in support of any claim for any less period than mentioned in this act.

Sect. 9. "That this act shall not extend to Scotland or Ireland."

Act to extend to England only.

Commencement of the Abstract.

Commencement of the Abstract.

Sixty [now forty] years' title.

Before the Vendors and Purchasers Act, 1874 (37 & 38 Vict. c. 78), the general rule was that at least a sixty years' title must be shown by the abstract; but by sect. 1 of that act it is enacted that, subject to any stipulation to the contrary, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years might then be required.

Title to a reversion.

When it is said that a title commencing forty years back is sufficient, it must be understood that a title to the possession is meant; for the argument in favour of the title is founded on the conformity of the possession during forty years with the early assurances. But no inference in favour of the title to a reversion arises from lapse of time; and, therefore, however remote may be the origin of a reversionary estate, its creation must be shown, and the subsequent enjoyment of the possession under the instrument must be regularly established.

What a sufficient root of title.

If nothing appear on the face of the deeds comprised within the period of forty years, through which a purchaser is entitled to investigate the title, which throws a reasonable doubt or suspicion on the anterior title, the want of the prior instruments, though referred to or recited in the abstracted deeds, is not material. This point, which had much divided the opinion of the profession, was decided in the case of *Prosser* v. *Watts*, 6 Madd. 59, the circumstances of which were as follows:—A conveyance, dated in 1753, under which there had ever since been an undisturbed possession, recited certain prior deeds as matters of title. The vendor had not in his possession or power the deeds recited, or copies of them, and was unable to give any evidence as to what was become of them. The purchaser, for this reason, objected to the performance of his contract, alleging that the recital affected him with constructive notice of the contents of the deeds, and that he could not

Loss of recited deeds more than forty years old, no objection to the title.

Commencement of the Abstract.

safely complete his purchase without seeing that the deeds confirmed the title. Sir J. Leach, V.-C., said: "There must of necessity be some practical limit to the operation of this objection; and the true inquiry seems to be in every case, whether the absence of the deed recited throws any reasonable doubt upon the title of the vendors." See also *Pain* v. *Lovegrove*, 4 Dr. 170. And by sect. 2 of the Vendor and Purchaser Act, 1874, "recitals, statements, and descriptions of facts, matters, and parties contained in deeds, intruments, acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions." A recital in a conveyance more than twenty years old that the then vendor was seised in fee simple was held by Malins, V.C., to be a recital of fact within the meaning of the section so as to preclude a purchaser from requiring earlier title (*l*): *Bolton* v. *London School Board*, 7 Ch. D. 766.

The liability of a vendor to abstract all the documents in his possession was a point on which the opinions of conveyancers were much divided. See Sugd. Vend. 407; Hayes, 1 Intr. Conv. 566; Dart, V. & P. 296, and vol. i, p. 64, of the 3rd edition of this Work. Now, however, by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is enacted that after the commencement of the act—

Sect. 3 (3). "A purchaser of any property shall not require

(*l*) This decision would appear to render advisable the insertion, in every conveyance of land in fee simple, of a recital that the vendor, settlor, &c. is seised in fee free from incumbrances, so as to render the conveyance after twenty years from its execution a sufficient root of title under an open contract. If, however, this point should again be raised in any future case it might perhaps be open to question whether a purchaser can, under this section, be deprived of the right given to him by the first section to require a forty years' title, the earlier documents of which might possibly furnish the proofs that the recital as to seisin was inaccurate.

Commencement of the Abstract.

the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time (*m*), notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties and perfected, if and as required by fine, recovery, acknowledgment, inrolment, or otherwise."

This section applies only to titles and purchases on sales properly so called, and only if and so far as a contrary intention is not expressed in the contract. (Sub-sects. 8 and 9.)

"Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court." (Sub-sect. 11) (*n*).

(*m*) A purchaser who has notice of a deed forming part of the vendor's title has constructive notice of its contents: Sugd. Vend. 775; see also *Patmam* v. *Harland*, 17 Ch. D. 353. The effect of this section is to take away the right of a purchaser on an open contract, to require the production of all documents recited or referred to. But in a case where the deed mentioned as the root of title recited an earlier conveyance in fee, subject to the conditions, &c. on the part of the grantee therein mentioned, a condition that "No purchaser shall investigate or take any objection to the title prior to the commencement of the abstract," was held not to preclude the purchaser from insisting on further explanation as to the nature of these conditions: *Phillips* v. *Coldcleugh*, L. R., 4 Q. B. 159, and see sub-sect. (11), *post*.

(*n*) Specific performance will not be enforced, if a defect on the vendor's title appears on the face of the abstract (*Sellick* v. *Trevor*, 11 M. & W. 722; *Phillips* v. *Coldcleugh*, L. R., 4 Q. B. 159); nor where a defect on the title is accidentally disclosed by the vendor (*Smith* v. *Robinson*, 13 Ch. D. 148); or is discovered *aliunde* by the purchaser: *Shepherd* v. *Keatley*, 1 C. M. & R. 117; *Darlington* v. *Hamilton*, Kay, 550; *Waddell* v. *Wolfe*, L. R.,

Except in cases covered by the provisions of the act above quoted, it is the established rule that an appointment should not be abstracted without previously showing the creation of the power and the ceremonies requisite to the valid exercise of it (*o*); nor a post-nuptial settlement executed in pursuance of articles antecedent to the marriage, without first abstracting the articles at length, that it may be seen whether or not the settlement is in conformity with them. The admittance of a party to copyholds, in pursuance of a surrender, must be preceded by showing that there was a surrender which authorized such admittance.

Commencement of the Abstract.

Appointment.

Settlement.

Admittance to copyholds.

The provisions of this act do not seem to affect the right of the purchaser to have all documents of earlier title, which relate *exclusively* to the property purchased, handed over to him on completion of the purchase. Where a vendor retains any part of an estate to which any documents of title relate, he is entitled to retain such documents. See stat. 37 & 38 Vict. c. 78, s. 2, r. 5.

Documents of earlier title.

Sometimes the indefensible course is pursued of

Suppressing intermediate deeds.

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9 Q. B. 515; *Harnett* v. *Baker*, L. R., 20 Eq. 50; *Jones* v. *Clifford*, 3 Ch. D. 779.

If it is intended to preclude the purchaser from his rights as to production of title, a special condition to that effect must be inserted in the contract. The condition must be plain and explicit, and must not be framed so as to suggest what the vendor knows is not the actual state of the title: *Re Bannister, Broad* v. *Munton*, 12 Ch. D. 131; *Marsh* v. *Earl Granville*, (C. A.), W. N. 1883, p. 119.

(*o*) Sales under powers contained in settlements and wills will probably be less frequent than formerly, such powers being in great measure superseded by those conferred on tenants for life, and other limited owners, by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sects. 3, 58.

When land is vested by one deed in trustees upon trust for sale, and to hold the proceeds of sale, and to apply the rents until sale, upon trusts declared by another deed, it will now be necessary for the purchaser to require production of the latter deed in order to ascertain whether the sale is made with the consent of the tenant for life, rendered necessary in all such cases by sect. 56 of this act.

As to the due execution of powers, see as to deeds, stat. 22 & 23 Vict, c. 35, s. 12; and as to wills, see stat. 1 Vict. c. 26, s. 10. *Et vide infra*, tit. "APPOINTMENT."

Commencement of the Abstract.

suppressing intermediate deeds, which are supposed, in event, to have become immaterial to the title, as, where a mortgage has been paid off and the estate reconveyed; in which case the deeds of mortgage and reconveyance are laid aside under the notion that the parties are placed in *statu quo* by the reconveyance, and from an anxiety to keep out of sight the circumstance of the mortgagor having encumbered the property. But the notion is often erroneous, and the practice very improper; the revocation of a will, or some other effect extremely important to the title, might have been produced by the suppressed deed. The only fair course is, to set out all the deeds in the vendor's possession, leaving the purchaser's counsel to judge of their materiality and effect (*p*).

Commencement of abstract.

The most satisfactory document with which an abstract can commence is a purchase or mortgage deed, from which, under ordinary circumstances, it may be presumed, that the state of the ownership was then investigated, and a title deduced during the preceding forty years; a presumption, however, which, in the case of a purchase deed, by no means implies a perfect title; for there may have been special stipulations, indemnities, and abatements for apparent defects, all of which a vendor takes care to keep out of sight. A mortgage deed, if the security does not appear to have been taken for an existing debt, is more satisfactory in this respect than a purchase deed, as such a transaction can never be the subject of special stipulations as to title, and a

Purchase or mortgage.

(*p*) The case of *Drummond* v. *Tracy* (Johns. 608) extended this rule to documents creating mere equitable charges, and stated that such charges, even though discharged, ought to be communicated to the purchaser; and Lord St. Leonards expresses his approval of the rule so laid down: Sugd. Vend. 411. This rule is, however, not in accordance with the usual practice of conveyancers, which is to avoid the unnecessary disclosure of mere equities upon a title, and it is to be feared that the opposite practice, if introduced would, in the generality of cases, be likely to lead to unnecessary delay and expense. See Dart, V. & P. 301.

As to expired leases, see p. 78. See further as to the impropriety of omitting from the abstract transactions, even though

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mortgagee will not lend his money without strictly scrutinising the offered security.

Settlement or devise.

A settlement by deed, or a specific devise of the property is, of course, less satisfactory than a purchase deed, inasmuch as the disposition by the settlor or testator may have been made *quantum valeant*. See *Parr* v. *Lovegrove*, 4 Drew. 170.

A general devise in a will is obviously insufficient as a root of title; the testator's seisin must be shown either by abstracting the conveyance to him of the property, or by the production of other evidence. As to evidence, *vide post*, pp. 88 *et seq.*

As to title under adverse possession by mortgagee.

Whether a person would be compelled to take a title gained under the Statute of Limitations, by long possession by a mortgagee without acknowledgment, is not clear. The objection to it is, that the fact upon which its validity depends, namely, the non-recognition of the mortgage debt, is not susceptible of positive proof, and there may have been disabilities in the mortgagor keeping alive the right of redemption. However, in the case of *Cooper* v. *Emery* (1 Hayes, Conv. 274, 5th ed.), a title of this kind was forced on a purchaser.

Titles under grants from the Crown.

Reversions and remainders in the Crown were not destructible by recovery, nor can they now be barred by an enrolled assurance; and it is therefore necessary, in deducing a title under a grant from the Crown, to set forth the original grant, in order that it may be seen whether any interest remains in the Crown or not, or whether any rent, condition, or service, has been reserved (*q*). As to the limitation of the rights of the Crown, *vide ante*, p. 47. The foundation of a title to tithes held as a lay property is usually a grant from the Crown after the dissolution of the monasteries. The original grant ought therefore to be set forth, and (omitting

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bonâ fide, supposed by the vendor not to affect the title, *Gray* v. *Fowler*, L. R., 8 Ex. 249; see also *Palmer* v. *Locke*, 18 Ch. D. 381.

(*q*) Intermediate instruments will be omitted and the history will be taken up so as to show a good forty years' title: Dart V. & P. 295; see also *Pickering* v. *Lord Sherborne*, 1 Craw. & Dix Abr. 254.

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intermediate documents), the abstract should show a title for the last forty years: Sugd. Vend. 367; and see *Pickering* v. *Lord Sherborne*, 1 Craw. & Dix. Abr. 254.

Estate sold tithe free.

When an estate is sold tithe free, the tithes being regarded as having been merged under the Acts 1 & 2 Vict. c. 64, and 2 & 3 Vict. c. 62, the early title to the tithes must be shown. Liability to tithes, when property is sold tithe free, is a sufficient ground for resisting specific performance by a purchaser: *Ker* v. *Cloburg*, Sugd. Vend. 321; but see *Bincks* v. *Lord Rokeby*, 2 Sw. 222. The question whether an estate is tithe free or not is said to be a question not of title but of fact: See Sugd. Vend. 321; and *Smith* v. *Lloyd*, 2 Sw. 224 n.; *Wallinger* v. *Hilbert*, 1 Mer. 104.

Advowsons.

The extreme period within which an advowson may be recovered against a party adversely exercising his right of presentation is a hundred years (*r*); and notwithstanding the provisions of the recent Act (*s*), that period should be covered by the abstract of title to an advowson. A list of the successive presentations should accompany the abstract, so as to show that the enjoyment has gone along with the title: Sugd. Vend., p. 367.

As to titles derived under old leases.

In the case of a leasehold title, the general rule is that the original lease and all mesne assignments should be abstracted. But where an estate is held under a lease of great antiquity, a vendor can only be required to show the creation of the term, and to deduce the title for the last forty years; and it is not incumbent on him to trace its history, uninterruptedly, from the origin of the lease down to the immediate transaction.

It was formerly thought that even the absence of the deed creating the term would not render the

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(*r*) See 3 & 4 Will. 4, c. 27, s. 30, and 37 & 38 Vict. c. 78, s. 1, *ante*, pp. 17, 23.

(*s*) The Vendors and Purchasers Act, 1874 (37 & 38 Vict. c. 78), does not contain any definition of land; it is therefore doubtful how far the provisions of that Act with regard to contracts for sale of land apply to advowsons and other incorporeal hereditaments.

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title unmarketable. See 1 Prest. Abs. 11. But in a recent case it was held that a vendor, under an absolute contract for the sale of leaseholds, was bound to produce the lease, which was the root of his title, although the lease was dated in 1606 (*t*): *Frend* v. *Buckley*, L. R., 5 Q. B. 213.

Time does not run against an administrator, except from the grant of administration.

One danger which formerly attended the titles of leasehold estates, the possibility of a representation to a deceased owner having been dormant for many years, from the neglect of any person to obtain administration to his effects, no longer exists; the Statute of Limitations having enacted, that time shall run against an administrator during the dormancy of the representation: Sect. 6, *ante*, p. 10.

Title to renewable leases.

The well-known rule, that a renewal of a lease by a trustee or person entitled for a partial interest shall enure for the advantage of all who were beneficially interested in the former lease, gives rise to great embarrassment in titles to property of this description; for it is usual to state in the new lease the surrender of the former lease, the production of which the purchaser would be entitled to require, the reference to it being notice to him of its contents. See *Coppin* v. *Fernyhough*, 2 Br. C. C. 291; *Hodgkinson* v. *Cooper*, 9 Beav. 304; see also Sugd. Vend. 410. And by parity of reasoning, if such lease contained, as it probably would, a similar reference to a prior lease, the prior lease must also be produced, and so on to the original lease. With this requisition it is not often in the power of the vendor to comply, as the surrendered leases are given up to the lessor. In such cases it will be necessary to make out the history of the title to the surrendered leases, and carry it back to the same period that would have been proper had the lease which is the subject of sale been the original lease.

Titles to renewable leases are also defective in the legal title. The restraining statute, 32 Hen. 8, c. 28, merely makes a lease granted contrary to its provisions voidable by the successor, and inflicts no

(*t*) If the lease is not in the vendor's possession, the purchaser must bear all expenses attending the search and production of the instrument, *infra* p. 91.

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penalty on the grantor; so that ecclesiastical persons who renew leases are not generally very careful to ascertain that the legal estate in the subsisting lease is vested in the person who affects to surrender it, and hence the legal estate is sometimes left outstanding for more than a year after the grant of the new lease, which is thus invalidated. In the case of property held under a lease for lives, it must be shown that the lives are in existence, notwithstanding there is in the lease a covenant for perpetual renewal: *Anderson* v. *Higgins*, 1 J. & L. 718.

As to proving the execution of a lease.

The general rule is, that after acceptance of the abstract the purchaser cannot require the deeds to be proved by the witnesses. He is supposed to assume the deeds to be such as on the face of them they appear to be, and the only matter in dispute being as to what may be their legal effect, the necessity of formal proof is dispensed with, and he cannot turn round at the trial and dispute their genuineness. Whether this rule would, under ordinary circumstances, extend to excuse the vendor of a leasehold from proving the execution of the lease in an action to enforce the contract, is doubtful; but where the purchaser had returned the abstract immediately upon its being sent to him, stating that he merely bid at the request of the vendor, it was held, in an action against the bidder for loss on a re-sale, that the vendor must prove the execution of the lease in the ordinary way: *Laythoarp* v. *Bryant*, 1 Bing. N. C. 421; *S. C.*, 1 Scott, 327.

Vendor of leaseholds formerly bound to produce lessor's title.

Bishop's lease.

The point was formerly much ligitated, whether the purchaser of leaseholds was entitled to call for the production of the lessor's title. See Sugd. 2 Vend. 10th ed. 140. The case of *Fane* v. *Spencer* (2 Mer. 430, n.) decided, that the purchaser of a bishop's lease was not entitled to call for the lessor's title; but, according to subsequent decisions, this must be considered as an exception to the general rule; that rule being, that the performance of a contract could not be enforced by a vendor who did not produce his lessor's title.

And consequently wherever the vendor of a leasehold did not intend to produce his lessor's title, it was necessary that he should state such an intention

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in the conditions of sale; as to the effect of which, see *Shepherd* v. *Keatley*, 1 Cr., M. & R. 117. As to waiver of the right to production of the lessor's title, see *Haydon* v. *Bell*, 1 Beav. 337; *Warren* v. *Richardson*, You. 1.

New rule V. & P. Act, 1874; Conv. Acts, 1881 and 1882.

But now as regards sales made after the 31st of December, 1874, it is enacted that (unless a contrary intention is expressed in the contract of sale) "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold:" 37 & 38 Vict. c. 78, s. 2, r. 1. And by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is enacted that after the commencement of that Act, and subject to the terms of the contract,—

Sect. 3 (1). "Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion."

Sect. 13 (1). "On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion."

And by the Conveyancing Act, 1882, sect. 4, which applies both *before* and after the commencement of the Act,—

"Where a lease is made under a power contained in a settlement, will, Act of Parliament or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of title, to the lease."

Neither of these provisions, however, relieves a lessee or underlessee on granting an underlease, in the absence of stipulation to the contrary, from the necessity of producing his lease or underlease, and proving his subsequent title. See *Stranks* v. *St. John*, L. R., 2 C. P. 376. See further on this subject, *infra*, tit. "AGREEMENTS."

Attendant term.

An attendant term forms part of the title to the equitable inheritance. The creation of the term

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should be shown, if possible (*u*); but although this is not done, the title cannot be objected to where the term is more than forty years old, and the evidence of possession during that period accords with the apparent title. It is to be observed, that a danger to which the title to a term was formerly exposed, that of a dormant representative to the last true owner, has been removed by the Statute of Limitations (3 & 4 Will. 4, c. 27), s. 6, *vide ante*, p. 10); so that wrongful possession for twelve years will, in all cases not between trustee and *cestui que trust*, confer an indefeasible title. Generally speaking, the courts will presume the fact of mesne assignments having been regularly made: *Earl* v. *Baxter*, 2 W. Black. 1228; see also *White* v. *Foljambe*, 11 Ves. 337, 350.

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Abstract at vendor's expense.

According to the general practice in modern times the abstract is prepared at the vendor's expense by his solicitor. In the case, however, of sales of lands to a railway or other company under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), it is enacted by sect. 82 of that act, that "the costs of all such conveyances shall be borne by the promoters of the undertaking; and such costs shall include all charges and expenses, incurred on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title."

(*u*) The deed creating the term should, if possible, be abstracted, and also all mesne assignments thereof in recent times, so as to show in whom they were created when merged under 8 & 9 Vict. c. 112. See Dart, V. & P. 289; Sugd. Vend. 370.

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Similar provisions are contained in most of the earlier acts relating to railways, canals, and other undertakings.

Delivery of deeds not sufficient.

The purchaser has a right to require that an abstract be delivered to him, and a delivery of the deeds themselves to him is not sufficient: Sugd. Vend. p. 406; and see *Howe* v. *Wingfield*, 3 Sc. N. R. 340.

The general rule is that the vendor bears the expense of the abstract, but by the Conveyancing and Law of Property Act, 1881, sect. 3 (6), the expense of making abstracts of documents not in the vendor's possession is thrown on the purchaser.

The charge for drawing an abstract is strictly 6*s*. 8*d*. for every sheet of eight folios of seventy-two words, and half that amount for a copy of an abstract already drawn. See Schedule II. to the Rules under the Solicitor's Remuneration Act, 1881 (44 & 45 Vict. c. 44). An abstract should be prepared with the utmost care, and should be written in a clear legible hand on good paper. It should state in the heading whose title is abstracted and in whose interest, and it should be accompanied by a copy of the agreement or conditions of sale: Sugd. Vend. 406.

Formerly it was considered that in the absence of express stipulation to the contrary a purchaser at an auction of several lots held under the same title was entitled to a separate abstract in respect of each lot purchased. The necessity for stipulating to the contrary has been done away with by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which enacts that subject to the terms of the contract (see subsect. (9),—

Sect. 3 (7). "On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense."

This provision only applies to purchasers on sales properly so called, and does not affect intending mortgagees or lessees. See subsect. (8).

On delivery of the abstract to the purchaser, he

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is entitled to the possession of it for the purpose of investigating the title, and taking opinions thereupon, and also to assist him in the preparation of the conveyance; and he may retain it even after rejection of the title, in order to show the grounds of such rejection: *Roberts* v. *Wyatt*, 2 Taunt. 268. Until the purchase is completed or abandoned, although the property in the abstract is not vested absolutely in either party, the intending purchaser has such temporary and qualified property therein as enables him to maintain an action of trover for it even against the vendor: *Roberts* v. *Wyatt*, *ubi supra*. If the purchase is completed, the abstract becomes the absolute property of the purchaser. But if the contract is finally abandoned it must be returned, and no copy of it must be retained. Observations and opinions written thereon may be erased; and if written on separate paper may be retained by the purchaser: *Wood* v. *Court*, 2 S. Atk. Conv. 463; see also Sugd. Vend. 428; Dart, V. & P. 279.

The most material consideration in the preparing of an abstract is, to give every information which can possibly bear upon the validity of the title, or which may be required for the purpose of framing the recitals, &c., in the conveyance to the purchaser; subject to this all-important requisite, brevity is desirable for the purpose, not only of saving time and trouble to all parties, but of submitting the title to counsel in the most compact form, unembarrassed by extraneous particulars, so that a comprehensive view of the whole may be most easily taken.

Care should be taken to make the abstract perfect (*x*) in the first instance. If the sale is made subject to the very ordinary stipulations, that the vendor shall deliver an abstract within a certain time, and that the purchaser shall make his objections within a certain time, and the vendor delivers an

(*x*) A perfect abstract has been defined as one "which contains with sufficient clearness and sufficient fulness the effect of every instrument which constitutes part of the vendor's title." *Per* Kindersley, V.-C., in *Oakden* v. *Pike*, 11 Jur., N. S. 666.

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imperfect abstract, the vendor's neglect to deliver a perfect abstract absolves the purchaser from all obligation of making objections within the time specified. See *Hobson* v. *Bell*, 2 Beav. 17; *Tanner* v. *Smith*, 4 Jurist, 310; *Southby* v. *Hutt*, 2 M. & Cr. 211; *Sherwin* v. *Shakespear*, 5 De G., M. & G. 517; *Upperton* v. *Nickolson*, L. R., 6 Ch. 436. And *wilful* neglect on the part of the vendor to deliver a proper abstract within the fixed time will even in equity entitle the purchaser to avoid the contract: *Roberts* v. *Berry*, 3 De G., M. & G. 284; *Seton* v. *Slade*, 7 Ves. 264; *Tilley* v. *Thomas*, L. R., 3 Ch. 61.

Title under exchange.

If the property has been derived under a common law exchange, or an exchange by mutual conveyances with eviction clauses (*vide infra*, tit. Exchange), the title to the estate given in exchange must (*y*) be shown from the usual period down to the date of the exchange (*Bastard's case*, 4 Rep. 121), unless, in the case of a common law exchange, it can be proved that the lands given in exchange have been aliened by the other party (*z*).

Upon the sale of a share by one tenant in common to another, the purchaser, if he stipulates for the delivery of an abstract, will be entitled to an abstract of the title to the whole property down to the creation of the tenancy in common, and thereafter of the vendor's share: *Morris* v. *Kearsley*, 2 Y. & C. Ex. 139. But in the absence of such stipulation it would seem that the vendor is only bound to furnish an abstract of title to his own share: *Law* v. *Law*, 9 Jur. 745. See also *Phipps* v. *Child*, 3 Drew. 709; Sugd. Vend. 377, 428.

Title under Inclosure Act.

The title to an allotment under an Inclosure Act depends, of course, upon the title to the estate in respect of which the allotment was made; although the tenure of the allotment is always, in the absence

(*y*) So also, where land has been exonerated from tithe by an exchange under 6 & 7 Will. 4, c. 71, s. 30. See Dart, V. & P. 289.

(*z*) The statute 8 & 9 Vict. c. 106, s. 4, enacts "that an exchange or a partition of any tenements or hereditaments made by deed executed after the 1st day of October, 1845, shall not imply any condition in law."

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of any provision to the contrary in the act, of common socage, whatever may be the tenure of the commoner's estate (*Doe* d. *Sweeting* v. *Hellard*, 9 B. & Cr. 789); even though the act provides that allotments shall be held to the same uses as the lands in respect of which they are allotted: *Doe* v. *Davidson*, 2 Mau. & Sel. 175. And see the stat. 6 & 7 Will. 4, c. 115, "for facilitating the Inclosure of open and arable fields in England and Wales."

Inclosures.

An allotment is no evidence that the person to whom it was made was seised in fee, as allotments may be and frequently are made to tenants for life, or other owners of partial estates. Great difficulties in titles derived through Inclosure Acts frequently arise, from the impossibility of determining in respect of which part of the lands or common rights, belonging to the allottee at the time of the inclosure, any given portion of the allotment was made. Thus if a person have several open pieces of land held under distinct titles, and an allotment be made to him in general terms in lieu of all his lands in the parish, unless it can be shown what part of the allotment was made in respect of each piece of open land, it is obvious that no title can be made to any part of the allotment, without deducing the title to the whole of the lands which were subject to the inclosure; and an incumbrance or defect of title affecting any portion of the inclosed lands will affect the *whole* of the allotment, on account of the impossibility of distinguishing the exempted parts. Sometimes the surveys and papers in the hands of the clerk of the peace furnish the requisite information; but frequently they are not accessible. If the title to all the lands of the owner in question which were subject to the operation of the act be well deduced (evidence of course being given that the lands to which a title is shown *were* all the lands), the title to every part of the allotment will be free from objection. This supposes that the allottee had the fee-simple in all the lands in respect of which the allotment was made, or, at all events, that they were subject to the same limitations, so as to devolve in the same channel. But where this is not the

Effects of indiscriminate allotment, in respect of several lands held under different titles.

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case, as, if the allottee be owner in fee of White-acre, and tenant for life of Blackacre, and an entire allotment be made to him in respect of both those lands, a farther evil ensues; it then becomes necessary, at his death, in order to ascertain the rights of the respective owners to the several parts of the allotment, that those parts should be distinguished; and, if any of the persons entitled to either portion are under any incapacity, this cannot be effected by mutual agreement, but it is necessary to resort to a judicial proceeding. And it seems (though the contrary has been supposed by a learned writer, who has exposed, with much force, the evils in question, *vide* Coventry on Inclosures, p. 7), that formerly a bill in equity, and now an action, for ascertaining boundaries, would lie in such a case; an instance of which is afforded in the case of *King* v. *Moody*, 2 Sim. & Stu. 579, where A., who was entitled in fee to a manor, subject to an executory devise over, to arise at his death, having purchased certain freeholds in the parish, and also copyholds of inheritance, parcel of the manor, which were surrendered to him, and thereby became extinguished in the manor (*a*), and, consequently, subject to the executory devise, erroneously conceiving himself to be seised in fee simple of both estates, claimed of the inclosure commissioners one entire allotment for the whole, and the commissioners, acting under the same mistake, awarded certain lands to him, in lieu of both estates, describing the allotment to be in respect of lands of which he was seised in fee; the executory devise having taken effect, a bill was filed by the executory devisees, claiming such part of the allotment as was made in respect of the copyholds, and praying that a commission might issue to ascertain it, &c. It was objected, that the allotments having been described in the award as made in lieu of lands of which the allottee was seised in fee simple, evidence was not admissible to the contrary;

Interference of equity to apportion allotments.

(*a*) Extinguishment denotes the transfer of a copyhold interest from the tenant to the lord; enfranchisement is the transfer of the lord's interest to the tenant: Scriven on Copyholds, p. 276.

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and also, that the question was a legal one, and therefore, that the plaintiffs should be left to their remedy at law. But Sir J. Leach, V. C., overruled both these objections, holding the evidence to be admissible; and that, as the plaintiffs could not recover at law any specific portion of the allotment, they might come into a Court of equity to have the portion to which they were entitled ascertained. The Court, therefore, declared the plaintiffs to be entitled to so much of the allotment professed to be made in respect of the estate in fee of A., as was actually made in respect of the copyhold lands, and referred it to the master to apportion the allotment accordingly.

The evil which the Court was called upon to rectify in this case might have been prevented, and ought always to be prevented, by the claimant to several allotments carrying in before the commissioners a distinct claim for each property.

Exchange.

Upon an exchange under the Inclosure Acts, or under any of the acts authorizing the exchange of ecclesiastical property (*b*), or under the acts to facilitate the exchange of lands lying in common fields (4 & 5 Will. 4, c. 30), the title to the land given in exchange must be furnished down to the time of the exchange, and also so much of the title to the land taken in exchange as may show that the consents of persons interested, as required by those Acts, have been obtained. See Dart, V. & P. 287. But in the case of exchanges under the Commons Inclosure Act, 1845, it is provided that the confirmation of the award shall be conclusive evidence that all the directions of the Act have been obeyed (*c*).

By the Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), sect. 12, it is enacted that—

"Where the trustees or persons acting in the administration of any charity have power to determine on any sale, exchange,

(*b*) 55 Geo. 3, c. 147; 56 Geo. 3, c. 52; 1 Geo. 4, c. 6; and 6 Geo. 4, c. 8.

(*c*) This Act has been amended and extended by later statutes, 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; and 12 & 13 Vict. c. 83; and see *infra*, p. 74.

partition, mortgage, lease, or other disposition of any property of the charity, a majority of those trustees or persons who are present at a meeting of their body duly constituted and vote on the question shall have and be deemed to have always had full power to execute and do all such assurances, acts, and things as may be requisite for carrying any such sale, exchange, partition, mortgage, lease, or disposition into effect, and all such assurances, acts, and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being and by the official trustee of charity lands."

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Where, therefore, a title is derived under this act, or any act incorporated therewith (*d*), it must be shown by the abstract that the statutory requirements have been complied with: Dart, V. & P. 289.

As to encroachments on wastes.

It frequently happens, that the owners of property adjacent to a common have, from time to time, enlarged their territory by encroachments upon the waste, which, from the negligence arising from the minuteness of the interests of the individuals interested in opposing it, has been tacitly acquiesced in until the possession, originally wrongful, has ripened into an unimpeachable title. The right of entry, both of the lord and commoners, has been held to be barred by twenty (now twelve) years' possession: *Creach* v. *Wilmot*, 2 Taunt. 160; see *Hawke* v. *Bacon*, 2 Taunt. 156. An inclosure made from the waste, twelve or thirteen years since, and seen by the steward of the same lord, from time to time, without objection, may be presumed by the jury to have been made with the licence of the lord; and an ejectment cannot be brought against the tenant as a trespasser, without a countermand of the presumed licence: *Doe* d. *Foley* v. *Wilson*, 11 East, 56. Where the encroachment had subsisted with the knowledge of the lord during ten years, and the lord then broke down the fences, it was held a sufficient revocation of any licence which

(*d*) This Act is to be construed as one with the previous Charitable Trusts Acts, 16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136; and 25 & 26 Vict. c. 112.

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could be presumed from previous acquiescence, so as to entitle the lord to bring ejectment: *Doe* d. *Beck* v. *Heakin*, or *Parker*, 2 Nev. & P. 660; *S. C.* 6 A. & E. 495.

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In some instances, inclosure commissioners are authorized to treat encroachments which have been made within twenty years as part of the waste, and this power is sometimes extended to encroachments made within sixty years; though usually, in the latter case, the power is confined to calling upon the parties in possession to pay the value of the ground taken, exclusively of building and improvements thereon, but with an alternative power of seizure in case this claim is not satisfied. See the provisions of the statute, 6 & 7 Will. 4, c. 115, "for facilitating the inclosure of open and arable fields in England and Wales," ss. 19, 20, 21, 22, respecting encroachments. It would be well if all local acts contained a provision of this nature; but whether they do or not, inclosure commissioners should apply themselves to the task of ascertaining what, if any, recent encroachments have been made before they proceed to divide the common; for persons who have curtailed it in this manner cannot, it should seem, be disturbed after the inclosure is completed; as the rights, both of the lord of the manor and of the commoners, are satisfied and barred by the act, and the commissioners become *functi officio* on the execution of their award. This doctrine, however, admits of an exception in regard to cases in which the convenient execution of the act requires a prolongation of the commissioners' office. Thus, it has been held, that a rate made by commissioners for the completion of the roads four years after the execution of their award was valid, though the act vested in them an express authority in one particular case to rectify a mistake after the execution of the award, which, it was said, showed that, for all other purposes, the award was to be final: *Haggerstone* v. *Dugmore*, 1 B. & Ald. 82.

Duration of authority of commissioners for inclosures.

Encroachments from waste land are (like other acquisitions by wrong) of the fee, and descend to

the heir of the wrongdoer, or, if made by tenant for years, enure to the benefit of the reversioner: *Doe* d. *Pritchard* v. *Jauncey*, 8 C. & P. 99; *Doe* d. *Harrison* v. *Murrell*, Id. 134; *Whitmore* v. *Humphries*, L. R., 7 C. P. 1. And it has been held that an encroachment by a copyhold tenant on the waste of the manor will confer upon the tenant under the Statute of Limitations only a copyhold interest in the land encroached: *Att.-Gen.* v. *Tomline*, 5 Ch. D. 750. A doubt, however, appears to have been thrown upon this doctrine by Cotton, L. J.: *Vide S. C.* 15 Ch. D. at p. 158.

As to grants by the lord of portions of the waste of a manor by copy of court roll, see *Northwick* v. *Stanway*, 3 Bos. & Pul. 346; *Rex* v. *Wilby*, 2 Mau. & S. 504: *Rex* v. *Hornchurch*, 2 B. & Al. 189.

Ownership of waste strips adjoining roads, &c.

Strips of waste land on the side of an ancient highway, or of a river, are, together with the soil to the centre of the road or bed of the river, presumed to belong to the owner of the adjoining inclosed land: *Steel* v. *Prickett*, 2 Stark. 463; *Cooke* v. *Green*, 11 Price, 736; *Doe* d. *Pring* v. *Pearsey*, 9 Dowl. & Ry. 908; 7 B. & C. 304. See *Headlam* v. *Hedley*, Holt, 463. But the presumption may be rebutted by evidence of acts of ownership on the part of the lord of the manor: *Anon.*, Lofft, 358; *Doe* d. *Barrett* v. *Kemp*, 7 Bing. 332; 5 M. & P. 173; *Scoones* v. *Morrell*, 1 Beav. 251; or by the fact that other strips of land on the side of the same highway are held by persons other than the owner of the inclosed land: *Simpson* v. *Dendy*, 2 Jur., N. S. 642 (*e*). And if the strip of land communicate with open commons or other larger portions of land, the presumption is in favour of their belonging to such commons, &c., rather than to the owner of the adjoining inclosure: *Grose* v. *West*, 7 Taunt. 39. The presumption does not arise in respect of roads set out under modern

(*e*) The presumption that an encroachment by a tenant on waste land is made for the benefit of his landlord is not rebutted by the fact that the encroachment does not adjoin the land held by the tenant: *Earl of Lisburn* v. *Davies*, L. R., 1 C. P. 259.

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Inclosures.

Legal title not in the allottee, until the execution of the award.

inclosure acts: *Rex* v. *Edmonton*, 1 M. & Rob. 24; *Rex* v. *Hatfield*, 4 A. & E. 156.

Under the General Inclosure Act, the legal title of an allottee is not complete until the execution of the award (*f*): *Farrer* v. *Billing*, 2 B. & Al. 171; see also *Ellis* v. *Arnison*, 3 Dowl. & Ry. 27; 5 B. & Al. 47; 1 B. & C. 70. But local acts frequently contain a clause authorizing an allottee to dispose of his allotment before, and which, it seems, enables him to confer a title, which a purchaser would be compelled to accept: *Kingsley* v. *Young*, 18 Ves. 206. And the objection, that the commissioners might vary the allotment, would not avail persons who purchased with knowledge of the circumstances, as this is inherent in the nature of the property: Ibid. But if the act do not contain a clause to the effect in question, the fact of the commissioners' award not being executed is a valid ground for purchaser's refusal to perform the contract: *Lowndes* v. *Bray*, Sugd. Vend. 373; *Cane* v. *Baldwin*, 1 Star. 65. Of course, a conveyance of the estate itself, in respect of which the allotment is subsequently awarded, includes the right to the allotment: *Doe* d. *Dixon* v. *Willis*, 3 Moo. & P. 24.

But where a local Act directed that the commissioners, by notice, might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors; and that the owners might fence their allotments after they had been marked, staked out, and confirmed, and before the signing of the award, and might also, within three

(*f*) The title, under acts of Parliament, depends on the particular language employed; some acts confer a legal title without any formal conveyance. When a company was authorized to purchase land, and the act directed, that, in case of difference, a compensation jury should be empannelled, and that the verdict should be made a record of Quarter Sessions, and upon payment of the sum assessed or agreed upon, the undertakers were authorized to have and enjoy the lands to and for their own use and benefit; and the company took possession of certain lands after payment of the sum assessed; it was held that the record of Quarter Sessions was a sufficient legal title: *Bruce* v. *Willis*, 3 P. & D. 220; 11 A. & E. 463.

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months *before the execution of the award, sell and convey* their interests in the allotments, the commissioners being thereby authorized to allot to the purchasers, and the latter, *after the execution of the award*, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that, where the allotments were copyhold, the deed should be enrolled in the court rolls of the manor, and that the purchaser should be admitted tenant thereto, at the same time as the other allottees of copyhold lands, viz., after the execution of the award; it was held, that this authority to enclose, and so to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given) be enjoyed and exercised without the legal seisin of the land; and that, therefore, these provisions not sufficiently countervailing those of the General Inclosure Act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award: *Farrer* v. *Billing*, 2 B. & Al. 171.

Inclosures.

Where the local Act provided, "that the several lands *so to be allotted and awarded*, upon the said division and inclosure, to the several persons concerned, and the several messuages, &c., which shall be exchanged, &c., *immediately after such allotments and exchanges* are made, should be, remain, and enure to the several allottees, who should from thenceforth stand and be seised and possessed thereof," &c.; it was held, that an allottee acquired the legal estate immediately upon being put into possession by the commissioners, and before any award was executed: *Doe* d. *Harris* v. *Saunder*, 1 Nev. & P. 119; *S. C.* 5 A. & E. 664. As to exchanges under inclosure acts, see *Wingfield* v. *Tharp*, 10 B. & Cr. 785; *Cox* v. *King*, 4 Scott, 553; *Goodtitle* d. *Baker* v. *Melburne*, 2 M. & W. 853. As to what provisions in inclosure acts are directory merely, see *Casamajor* v. *Strode*, 2 M. & K. 706.

Enrolment of award.

Where the Act directed the enrolment of the award within a given time, it was thought that enrolment after that time would not give validity to the award, and this opinion is countenanced by the statute

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3 & 4 Will. 4, c. 87, which gave validity to awards which had not been duly enrolled, and enabled any parties interested to enrol such awards. This Act has no *prospective* operation.

Stat. 3 & 4 Will. 4, c. 87.

By the stat. 3 & 4 Vict. c. 31, s. 1, intituled "An Act to extend the Powers and Provisions of the several Acts relating to the Inclosure of Open and Arable Fields in England and Wales," it is enacted, amongst other things, that, subject to the right of appeal given by the 6 & 7 Will. 4, c. 115, "all awards that shall be made in pursuance of that Act and of this Act, or either of them, shall, immediately after the execution thereof be conclusive evidence that the provisions of the said Acts have in all respects been complied with, and all necessary consents have been given; and no other evidence than such award shall be requisite to establish the title under the inclosure of the parties concerned or interested in the same;" and parties proceeding to inclose or cultivate their allotments are to be deemed to have waived all right of appeal.

Effect of death of one of the commissioners.

Where the Act has appointed three commissioners, providing that two of the three may act, and the award, &c., are accordingly executed by two only, it must be shown that the third was living at the time; for the *co-existence* of the full number of commissioners has been held essential to the validity of the acts of a quorum: *Doe* d. *Nicholson* v. *Middleton*, 6 J. B. Moo. 532; see *Doe* d. *Read* v. *Godwin*, 1 Dowl. & Ry. 259.

Title to enfranchised or extinguished copyholds.

The title to an enfranchised copyhold estate depends upon both the freehold title of the lord, and the customary title of the tenant previously to the enfranchisement, both of which must therefore formerly have been shown. Where, however, the enfranchisement took place under the General Enfranchisement Acts (*g*), it was not necessary to show the lord's title. And now by the Conveyancing and Real Property Act, 1881 (44 & 45 Vict. c. 41), sect. 3 (2), it is provided that after the commence-

(*g*) 4 & 5 Vict. c. 35; 15 & 16 Vict. c. 51; and see 21 & 22 Vict. c. 94, s. 10.

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ment of that Act, and so far as a contrary intention is not expressed in the contract, "where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement." If the title has arisen by merger of the copyholder's interest in that of the lord, the prior copyhold title must of course be shown.

Pews.

Upon the sale of a messuage, with a pew appurtenant thereto, the title to the pew must be shown by production of the faculty or by prescription, which is founded on the presumption that a faculty was at some time granted. A prescriptive right must be strictly proved: it must be shown that the seat has been from time immemorial appurtenant to the messuage, for even the Ordinary cannot grant a seat appurtenant to lands (*h*); and that the right of the occupiers has been continuously exercised and maintained, *e.g.*, by executing any repairs which may have been necessary: *Crisp* v. *Martin*, 2 P. D. 15. Although the point has not been expressly decided, still it would appear that ancient possession going beyond memory might be sufficient to uphold a prescriptive title without evidence of repair, as no repairs may have been necessary in the memory of any person living: *Knapp* v. *Parishioners of St. Mary, Willesden*, 15 Jur. 473. And see on the question of the right to pews, 2 Phill. Eccl. Law, 1801 *et seq.*; Shelford, R. P. Stat. 115.

Life and reversionary interests in stock, &c.

In deducing the title to life and reversionary interests in trust moneys, an abstract of the deed or will creating the trusts, of course, will be furnished, which should set forth not only the particular trusts under which the vendor claims, but also the several clauses and provisions by which his interest is liable indirectly to be affected, as powers of advancing portions to children, varying investments,

(*h*) The freehold of a chapel or lesser church, part of a parish church, may be vested in a private person, and is not necessarily annexed to a dwelling-house. *Parker* v. *Leach*, L. R., 1 P. C. 312.

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appointing new trustees, &c. If these powers are to be exercised with the consent of the person whose interest is the subject of the sale, it seems to be the better opinion, that, after he has parted with his interest, they cannot be exercised without the concurrence of the transferee: *Vide infra*, tit. Mortgages. If the powers in question are, by the terms of the instrument creating them, exercisable without the vendor's concurrenee, then the fact of the existence of such powers ought, in fairness, to be communicated to the purchaser; for which purpose an abstract of the deed might be produced at the sale, to which reference should be made in the conditions; and this may be a prudent precaution, even where there is ground to contend that the purchaser's concurrence would be requisite to the due exercise of the power. It is probable, however, that if the purchaser has notice of the deed or will creating the trust (as he necessarily has, if the conditions of sale refer to it), he would be bound by all the clauses contained in the deed; and, therefore, it is especially incumbent on him, to ascertain what those clauses are. See *Walker* v. *Maunde*, 1 Jac. & W. at p. 183. But the description must not be so framed as to mislead the purchaser; for an ambiguous reference to the means of obtaining correct information will not excuse such misrepresentation: *Flight* v. *Booth*, 1 Scott, 190; *Dykes* v. *Blake*, 6 Scott, 320. A description of a sum as so much "principal money invested in consols," does not exclude the purchaser from taking a larger sum if the stock sells for more: *Lucas* v. *Bond*, 2 Kee. 136. The purchaser would be entitled, at the vendor's expense, to an attested copy and covenant for or acknowledgment of his right to (*i*) the production of the deed creating the interest sold, and of any other instrument indirectly affecting the fund, as appointments of new trustees, &c., unless the contrary were provided by the conditions. Where the fund is standing in the names of executors, it may be some-

What is notice to a purchaser of the contents of deeds, &c.

Rights of purchaser of partial interest, in respect of deeds, &c.

(*i*) See stat. 44 & 45 Vict. c. 41 (Conveyancing, &c. Act, 1881), s. 9.

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times proper to ascertain that a distinct appropriation, taking it out of the testator's general estate, has been made, and that the legacy duty has been paid. *Bonâ fide* purchases, &c. of reversionary interests are no longer liable to be set aside on the ground of undervalue. See 31 Vict. c. 4, ss. 1, 2.

Title to life policy.

In making out titles to policies of life insurance, there is more difficulty than is generally imagined. Not only is it necessary to the validity of the policy that the age and state of health of the person whose life is assured should correspond with the representations made to the insurance office; but if the insurance is effected on the life, not of the insurer himself, but of another person, it ought to be proved that the party effecting it had such an interest in the life at the time of insurance, as is sufficient to validate the insurance; and these facts are so difficult, if not impossible, to be proved, that, if a purchaser is entitled to require such proof, the specific performance of a contract of this nature could scarcely ever be enforced against him. See *Brealy* v. *Collins*, 1 You. 317. It has been decided, that the interest requisite to give validity to the insurance of another's life must be a pecuniary interest; so that a policy effected by a father on the life of his son cannot be supported on the mere strength of the parental relationship: *Halford* v. *Kymer*, 10 B. & Cr. 724; *Worthington* v. *Curtis* (C. A.), 1 Ch. D. 419. But the interest of the insurer in the assured's life need not be a continuing one: *Dalby* v. *The India and London Life Assurance Co.*, 15 C. B. 365. Some of the insurance offices dispense with proof of interest altogether.

Life policies.

Assignment of policies.

Formerly the assignee of a policy could not sue at law in his own name: *Cook* v. *Blade*, 1 Ha. 390. But by the stat. 30 & 31 Vict. c. 144, assignees of life policies are enabled to sue at law in their own names on certain conditions as to notice (*j*).

(*j*) The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6), makes the assignment of a legal chose in action, of which the prescribed notice has been given, effectual in law to pass, subject to all prior equities, the legal right thereto, with all remedies and power to give discharges without the concurrence of the

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However, a considerable degree of risk is inseparable from property of this description; for, even if the present validity of the policy be well established, the maintenance of its validity is dependent on the continued observance of the conditions by the person whose life is insured, in not going abroad, or entering into military service, &c., and (where the policy is effected by the assured on his own life) is also liable to be defeated even in the hands of a transferee, by his (the assured's) death by duelling, suicide, or the hands of justice; against all which the purchaser can have no other security than the covenant of the person in question, and sometimes he has not even that: *Vide infra*, tit. MORTGAGES. Of course, the purchaser will see that the last premium has been paid. See *Want* v. *Blunt*, 12 East, 183; *Doe* d. *Pitt* v. *Shewin*, 3 Camp. 134.

Shares in mines.

Upon a sale of shares in a mining company, the purchaser cannot require a title to the mines themselves as if he were purchasing land, but it would appear that he is entitled to some reasonable evidence of the vendor's right to sell the particular property. See Sugd. Vend. 376, and *Curling* v. *Flight*, 6 Ha. 41.

Railway shares.

Upon a sale of railway and other shares little evidence of title is required: *Shaw* v. *Fisher*, 2 De G. & Sm. 11; 5 De G., M. & G. 596; *Wynne* v. *Price*, 3 De G. & Sm. 310. The seller should see to the registration of the transfer, so as to free himself from future liability for calls; but a purchaser is liable to indemnify the vendor against such liability until the transfer has been registered: *Wynne* v. *Price*, *ubi supra*; *Walker's case*, L. R., 2 Eq. 554; *Head's case*, L. R., 3 Eq. 84; *White's case*, ibid. Until the

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assignor; in case of dispute the debtor may require the claimants to interplead. A future debt may be absolutely assigned under this section: *Brice* v. *Bannister* (C. A.), 3 Q. B. D. 569; but an assignment by a bankrupt before bankruptcy will not give a good title to profits of a business accruing after the commencement of the bankruptcy, so as to defeat the title of the trustee: *Ex parte Nicholls, Re Jones*, 22 Ch. D. 782. As to payment into court, under the Trustee Relief Act, in cases of conflicting claims, see *Re Sutton's Trusts*, 12 Ch. D. 175.

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seller has paid up all calls on his shares the company may refuse to register the transfer: *Reg.* v. *Wing*, 17 Q. B. 645. But if the purchaser has been acknowledged by the company as a shareholder, he cannot be compelled to pay calls in arrear: *Watson* v. *Eales*, 23 Beav. 294. See Sugd. Vend. 376.

All the deeds must be abstracted.

All the deeds subsequent to that with which the abstract commences must be stated, not excepting any which may be supposed to have become immaterial, as mortgages which have been reconveyed, &c. (*k*). But deeds creating estates, &c., which have expired of themselves (as leases), may, generally speaking, be safely omitted (*l*).

Evidence to accompany abstract.

Exact copies of certificates of baptism, marriage, and burial, affidavits, &c., should be supplied; although, if evidence of this kind is voluminous, the result alone needs to be stated in the body of the abstract. Much time and expense would often be saved if an abstract were made as complete as possible in these particulars before delivery. In the case of complicated titles, the solicitor who prepares the abstract should lay it before counsel on behalf of the vendor, to advise on the evidence by which it should be accompanied, unless he feels competent to take the responsibility upon himself.

Judgment and crown debts should be noticed (*m*).

Any judgments, crown debts, or *lis pendens* which are known to affect the vendor should be noticed, excepting, however, where such information would have the effect of rendering the purchaser liable to judgments which otherwise would not affect him. Judgments are now substantive charges on the estate, and the vendor's solicitor will be liable in equity if he suppress any incumbrance on the property which is known to him. See *Arnot* v. *Briscoe*, 1 Ves. sen. 94; *Evans* v. *Bicknell*, 6 Ves. 174;

Liability of vendor's attorney for suppressing incumbrances.

(*k*) See as to suppressing a mortgage deed, *Heath* v. *Crealock*, L. R., 10 Ch. 22; and as to an equitable charge which had been paid off, *Drummond* v. *Tracy*, John. 608.

(*l*) Existing leases should be abstracted, and the counterparts should be produced for the purchaser's inspection, in order to show that there are no special provisions in favour of the lessee, and likely to prove detrimental to the purchaser.

(*m*) As to searches for judgments, &c., *vide post*, p. 99.

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Burrowes v. *Lock*, 10 Ves. 470; *Richards* v. *Barton*, 1 Esp. 268. But he is not answerable for an error in the abstract occurring without any fraudulent intention on his part, nor is the vendor. Thus it was held, that a purchaser who had resold, without examining the abstract by the title deeds, could not recover the expenses of such resale (the title proving defective) from the vendor: *Walker* v. *Moore*, 10 B. & C. 416.

By 22 & 23 Vict. c. 35, s. 24—

"Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action conveyed or assigned to a purchaser (*m*), or the solicitor or agent of any such seller or mortgagor, who shall after the passing of this Act, conceal any settlement, deed, will, or other instrument material to the title or any incumbrance from the purchaser, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any such cases to defraud, shall be guilty of a misdemeanour . . . and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee" (*n*).

Drainage loans, &c.

The abstract should notice any drainage or land improvement loans effected under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), or Settled Land Act, 1882 (45 & 46 Vict. c. 38), and should also set out the certificates of redemption of land tax, and evidence of exemption from tithe commutation rent-charge (*o*), if the property is sold free therefrom.

Custody of deeds should be stated.

Mention which of the abstracted deeds are in the vendor's possession, and in whose custody are the

(*m*) Or "mortgagee," 23 & 24 Vict. c. 38, s. 24.

(*n*) Where by conditions of sale a time is limited for commencement of title, and it is stipulated that no earlier title shall be required to be shown, it would appear that this section does not apply to the concealment of an incumbrance prior to the date fixed: *Smith* v. *Robinson*, 13 Ch. D. 148.

(*o*) Tithe rent-charge and land-tax are not incumbrances; and therefore land is presumed to be subject to them, unless the contray is stated in the contract or particulars of sale. See Sugd. Vend. 322. Although the vendor is not bound to mention these charges when the property is sold subject thereto, it is usual to do so and to specify the amount: Dart, V. & P. 283.

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others (*p*). The importance of this information is obvious (*infra*, sub tit. MORTGAGES), and the purchaser's solicitor, when he examines the abstract with the original deeds, will take care that it is correctly given.

Contract and particulars of sale to accompany abstract.

A copy of the contract, and, when the sale was by auction, of the particulars and conditions of sale, should accompany the abstract, including of course, as every properly drawn contract does, a full specification of the lands purchased.

Chronological order.

Arrangement.—As a general rule, the documents should be abstracted in the order of their dates; all extrinsic facts material to the title (as, alterations of names and boundaries of particular parcels, marriages, deaths, and other matters of pedigree, intestacy, &c.), with full particulars of names, additions, places, and other circumstances of identification, and the nature of the evidence by which it is proposed to support them, being noticed as they occur in the order of time. These facts should be directly stated, whether or not recited in subsequent instruments; in cases of a complicated descent a regular pedigree should accompany the abstract: Dart, V. & P., p. 299.

Wills.

Wills made before the Wills Act, 1 Vict. c. 26, if they relate to real estate, should be abstracted under the date of the publication, and in the same place any codcils should be stated, and the dates of the testator's death and probate of the will. These last facts should be again stated in the abstract in the order of date. Wills of personal estate made before the Wills Act, and all wills made thereafter, should be stated under the date of the testator's death.

Advowsons.

If the subject is an advowson, the presentations may be stated chronologically, in the course of deducing the title to the advowson itself.

Arrangement where title is divided.

Where, for a certain period, there is a distinct title to each of the several parts of the estate, which

(*p*) As to production of documents of title not in the vendor's possession, *vide post*, p. 92.

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afterwards become united in ownership, deduce the title to each part separately, up to the point of junction. By blending the whole under one chronological arrangement much confusion is produced. The resulting divisions of the abstract should be distinguished by separate headings. It has been sometimes recommended, when several mortgages or terms have been created in the same property, to adopt the same principle of division, and trace the title to each mortgage, &c., apart from the other; but this should seldom or never be attempted, because a term or a mortgage is not often assigned or transferred without the concurrence of some of the parties entitled subject to it, the state of whose title must be known before the effect of the conveyance in which he joins can be understood. The strict chronological order of an abstract should not be lightly departed from. Any subordinate arrangement which particular circumstances may render convenient will be best performed by counsel while perusing the abstract, in the shape of an analysis of the contents: as to which see 3 Prest. Abst. 191, 202; App 426; Sugd. V. & P. 413; Dart, V. & P. 308.

As to mortgages and terms.

Parties.

Parties.—It is seldom necessary to transcribe the description of any party, unless to distinguish him from another of the same name, or for the purpose of connecting him with evidence to be given as to his death, intestacy, &c. But notices of the characters in which parties act, should always be transcribed verbatim, as the construction of the instrument may be materially influenced by such descriptions, which are in the nature of recitals. If it is thought proper, in order to save the necessity of a distinct statement, to add any description of that kind, it should be shown, by inserting the words in brackets, that they do not form part of the deed which is being abstracted.

Recitals.

Recitals.—A recital, which manifestly can have no effect upon the title, and which is not required for the purpose of conveying information, may be entirely passed over; but every recital should be

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noticed at a greater or less length, wherever there is the slightest doubt as to the propriety of doing so. "As a general rule, the recitals in any document which is abstracted as a root of title, should, so far as it may in any way affect the estate comprised in the contract, be set out fully, even though the purchaser may be precluded from founding any requisition or objection thereon:" Dart, V. & P. 298. All recitals of lost documents or of facts which cannot be better authenticated, or of which the recital alone would be sufficient evidence, must be fully stated. Recitals of deeds, &c., which have been previously abstracted, and recitals of facts which have been already introduced as substantive statements in the abstract, should be barely noticed, a reference being made to the page of the abstract in which the information may be found at length. A recital in a purchase deed of the contract for sale, where one of the parties died previously to the execution of the conveyance, is of course important. A distinct recital of the payment of the consideration money, which, as between the vendor and third parties, is equivalent to an indorsed receipt (see *White* v. *Wakefield*, 7 Sim. 401), should be abstracted. Such a recital is *primâ facie* evidence of payment between the parties, although it may, as well as an indorsed receipt, be rebutted: *Coppin* v. *Coppin*, 2 P. Wms. 291: as to receipts, *vide post*, p. 87.

Recital of payment for purchase-money.

A recital may sometimes help out the description of the parcels. Thus, where a lease recited a former lease of premises of "fifty-nine acres, provincial measure," and an intention to demise "the said estate;" and then went on to demise "the same, being forty-five acres, statute measure;" the soil of a road which had been set out and made in the interval between the granting of the two leases, and which was included in the first lease, and not excepted from the second, was held to pass: *Doe* d. *White* v. *Osborne*, 4 Jur. 941 (*q*).

Recital of parcels.

(*q*) As to recitals in deeds, &c., more than twenty years old, *vide supra* p. 53.

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Testatum.

Testatum.]—Notice concisely the object or intention of the deed if any is expressed; the consideration, whether real or nominal; the persons by whom and to whom it is paid, and the acknowledgment of payment. State fully any trusts which may be declared of the money paid; and where the money is paid by several whether it is expressed to belong to them on a joint account.

Granting words.

Transcribe the operative, or granting and confirming part, at full length, omitting of course the words of grant, &c. in the past tense, frequently inserted in old conveyances, but which are only appropriate in a charter referring to a feoffment previously made; and distinguishing, by new lines, the statement of the intention and consideration, &c. from the granting part, and the words which operate at common law from the limitations of the use. State the *habendum*, and the words limiting the use, if any, verbatim; it should never be attempted to give the mere effect of this part of a deed. Sometimes the *habendum* is unskilfully introduced into a deed operating by appointment, and the appointment so worded as to convert limitations, which are intended to operate under the statute, into mere trusts: and occasionally, by a similar slip, the fee is limited "unto and to the use of" the releasee, or grantee, upon whose seisin uses in favour of other persons are intended to be raised.

As to using the present tense in abstracts.

It would conduce greatly to accuracy, and would facilitate the perusal of abstracts, if the contents of documents were abridged merely, without any attempt being made to convert the present into the past tense; an operation which often gives rise to ambiguity, where it is not performed with considerable care and skill.

Parcels.

Parcels.]—Take the description of the parcels at full from the first abstracted document, preserving every word that is characteristic, and omitting only the verbiage. In abstracting the subsequent deeds, this description may be referred to, care being taken to preserve distinctness between statements in the

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deeds, and observations by the person who prepares the abstract. Therefore, where a deed contains the same parcels as the last abstracted deed, but does not describe them by reference, instead of saying "all the premises comprised in the last abstracted deed," which might lead to the inference that they were conveyed by some description as loose as this: say:—"all that, &c.," and note, within brackets, that the parcels are the same as those of the last deed. But every variation in the description of the parcels in the subsequent deeds must be carefully noticed and explained. In this place reference should be made to any collateral sources of evidence which may be resorted to for the purpose of making out the identity of the parcels (*s*). Exceptions and reservations are, of course, important.

Limitations to trustees to preserve contingent remainders.

Limitations to trustees to preserve contingent remainders were sometimes incorrectly framed in such a manner as, where they occur in a deed, to pass the legal fee; thus protecting the subsequent limitations of the use from the operation of the statute. See *Venables* v. *Morris*, 7 T. R. 342, 438; *Colmore* v. *Tyndal*, 2 Y. & Jer. 605, as to a deed; and *Doe* d. *Compere* v. *Hicks*, 7 T. R. 433, as to a will. Such limitations should, therefore, be abstracted with sufficient particularity to show whether or not this has happened.

As to resulting uses.

State whether the ultimate use is limited back to the settlor or not; for the effect of such a limitation in cases coming within the operation of the present law of inheritance is to confer a new fee by purchase

(*s*) It was held in *Blackburn* v. *Smith*, 2 Exch. 783, that maps or plans annexed to the deeds for purposes of identification should be merely referred to, and that copies thereof ought not to be contained in the abstract; and Lord St. Leonards expresses the same opinion: Sugd. Vend. 408. But inasmuch as modern conveyances often contain no specific description of the parcels, but convey the property by reference to a plan, the production of the plan appears in such cases absolutely necessary for the identification of the parcels, and might, it is conceived, be insisted on: Dart, V. & P. 303; and see *Lyle* v. *Richards*, L. R., 1 H. L. 222.

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on the settlor: Stat. 3 & 4 Will. 4, c. 106, s. 3, stated *infra*.

Trusts by way of limitation of estate must be abstracted in the same manner as limitations of the use; and powers, if they have been acted upon, or if there is a present intention of exercising them, should be stated verbatim, otherwise they may be shortly referred to, and the fact of their not having been exercised, stated.

Trusts and powers.

Provisoes for cesser.

All provisoes for cesser of terms, &c., should be fully set out; also powers for changing trustees, wherever such powers have been exercised, or are intended to be exercised.

Covenants.

Covenants for title may be very concisely stated; but it is important to show with and by whom they are entered into, especially where the production of deeds is covenanted for, in order that it may be ascertained whether they run with the land. And the persons against whose acts the covenants extend, and the incumbrances, if any, which are excepted, must be noticed. Covenants for title are now implied where the party conveying is expressed to convey as beneficial owner. See the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1).

Execution, &c.

State the date of the execution of each instrument, and by whom; and if it be an appointment by virtue of a power which prescribes a particular mode of attestation, give an exact copy of the memorandum of attestation.

Execution by attorney.

If the deed was executed by attorney, state the date and terms of the authority. The Conveyancing Act, 1882, s. 8 (1), provides, as regards instruments executed after the 31st of December, 1882, "If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser, the power shall not be revoked at any time, by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power." Otherwise, in cases not within this provision, it should be shown

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that the principal was living at the date of the act done by his attorney (*Watson* v. *King*, 4 Camp. 272), and had not revoked the power, and that the attorney executed in the name of his principal. A power to bind the principal by deed must itself be under seal: *White* v. *Cuyler*, 6 T. R. 176; *Horsley* v. *Rush*, cit. 7 T. R. 209; *Berkeley* v. *Hardy*, 8 Dowl. & Ry. 102; 5 B. & C. 355.

Witnesses' names should be transcribed.

It is prudent precaution, suggested by the case of *Bryant* v. *Busk*, 4 Russ. 1, to transcribe the names and descriptions of the attesting witnesses to all modern deeds.

Receipts and indorsements.

All receipts and other memorandums indorsed, and any peculiarity attending them, should be noticed. In the case of *Kennedy* v. *Green* (3 My. & K. 699) the unusual position of the receipt on the back of a deed was, with other circumstances, considered important, as showing that a purchaser of the title under that deed had not exercised due diligence, which would have led to the discovery of a fraud. A recital of payment, or formal receipt in the body of the deed, was formerly conclusive as against the parties by way of estoppel (*Harding* v. *Ambler*, 3 M. & W. 279); but the indorsed receipt not being under seal was not: *Lambourne* v. *Cork*, 1 Dowl. & Ry. 211; *S. C.*, sub nom. *Lampon* v. *Corke*, 5 B. & Al. 611. See also *Greenslade* v. *Dare*, 1 Jur., N. S. 294; 20 Beav. 284. Although as between the parties a receipt indorsed was not conclusive, yet the absence of any receipt for the consideration is, as regards deeds executed before the 31st of December, 1881, notice to a purchaser that it has not been paid. And even the existence of a receipt on the back of the conveyance has not, under particular circumstances, been held to excuse subsequent purchasers from making further inquiries: *Coppin* v. *Coppin*, 2 P. Wms. 291. *Vide infra*, tit. MORTGAGES. But by the Conveyancing and Law of Property Act, 1881, sect. 54, it is enacted that "A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed." And, by sect. 55, "A receipt

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for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof." As these sections apply "only to deeds executed after the commencement of the act," the old precautions must still be observed as regards earlier instruments.

Stamps.

The stamps that are impressed on the deeds should be noticed, and the purchaser's solicitor should ascertain that they are the proper stamps applicable to such deeds, *at the time*. This may be a troublesome task, but should be undertaken, particularly in regard to recent deeds, as no deed can be used for the purposes of evidence, unless properly stamped. It would, therefore, clearly be incumbent on the vendor to procure this to be done.

Enrolment, &c.

The date of livery of seisin, or the place and date of enrolment, registration, &c., if any have taken place, should be mentioned, and the omission of any such formality, in cases in which it is generally required, should be noticed. As to the necessity of enrolment in the lifetime of the acting party, see *Hawkins* v. *Kemp*, 3 East, 410.

Erasures, &c.

All erasures and interlineations should be pointed out (*t*).

Acts of Parliament.

Acts of Parliament.]—A copy of each act of Parliament should, if possible, accompany the abstract; in addition to which, state in the abstract the general effect of the Act, and notice shortly all the clauses by which the title may be affected; as in an inclosure Act, the usual clause, that wills, &c. shall not be revoked, but shall have the same operation

(*t*) It is to be observed that in the case of deeds, erasures and interlineations are presumed to have been made at the time of or before execution (*Doe* v. *Catamore*, 16 Q. B. 745; *Williams* v. *Ashton*, 1 J. & H. 115); but where erasures and interlineations appear on the face of a will the presumption, in the absence of evidence to the contrary, is that they were made after the execution of the will: *Cooper* v. *Bockett*, 4 Moo. P. C. 419.

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upon the allotments as they would have had upon the lands subject to the inclosure (*u*). All unusual clauses should be pointed out, as well as the omission of any which are usual. The date of the royal assent should always be stated. Before the 33 Geo. 3, c. 13, an act took effect from the first day of the session in which it was passed: *Panter* v. *Att.-Gen.*, 6 Br. P. C. 486.

Wills.

Wills.]—Invariably transcribe the memorandum of attestation, including the names and description of the witnesses; because the devisee, whose title is derived through the will, might happen to be one of those witnesses, or might have been at the time of attestation the husband or wife of one of them, which would vacate the devise: *Vide* stat. 25 Geo. 2, c. 6, and 1 Vict. c. 26, s. 15 (*x*). Unless the will be long, an exact copy of the whole should be furnished; but where the length renders this inconvenient, extract the material parts in the precise words of the testator, which is better than attempting a statement of the effect or substance, the correctness of which often depends upon the right application of very difficult rules of construction.

3. The Evidence necessary to verify the Abstract.

Evidence necessary to verify the Abstract.

Duty of purchaser's solicitor.

If the abstract of title furnished by the vendor's solicitor be defective in any of the particulars already mentioned, it will devolve upon the purchaser's solicitor, in comparing the abstract with

(*u*) A doubt is sometimes raised, whether this clause applies to the wills of persons who are living at the time of the enclosure, a will being inchoate during the life of the testator. Nothing, however, can be more clear. It could apply to no other will, for it could not be necessary to declare that the will of a *deceased* testator should not be revoked. Wills now speak from the date of the death: 1 Vict. c. 26.

(*x*) Where a testatrix by a codicil gave a legacy "to B. Church, to be disposed of as Dr. I. pleases," one of the witnesses to the codicil was the wife of Dr. I., it was held, that Dr. I. was a mere trustee for B. Church, and that consequently the bequest was not invalidated: *Cresswell* v. *Cresswell*, L. R., 6 Eq. 69. See also on this question, *Thorpe* v. *Bestwick*, 6 Q. B. D. 311; *Re Fleetwood*, 15 Ch. D. 594.

Evidence necessary to verify the Abstract.

the deeds (*y*), to render it complete; and this should generally be done before the title is submitted for the opinion of counsel on behalf of the purchaser. See *Ireson* v. *Pearman*, 5 Dowl. & Ry. 687; 3 B. & C. 799. A neglect of this precaution frequently renders a second perusal of the abstract necessary. The propriety, however, of verifying the abstract before the opinion of counsel is taken upon it may depend upon circumstances; for if the abstract is well and fairly drawn in the first instance, it is obviously at least as probable that requisitions of counsel, involving an examination of the original documents, would not have been anticipated by the purchaser's solicitor as that they would. Lord St. Leonards observes, that if the deeds are at a distance or otherwise not easily accessible, and the abstract on the face of it appears to have been skilfully prepared, it may be convenient to defer the examination until after it has been perused by counsel, and when any inquiries may be answered at the same time; but, if recourse may easily be had to the deeds at any time, it will be better to examine them in the first instance.

In particular, the solicitor must scrutinize the execution and attestation of deeds and wills, the receipts indorsed, and the stamps; and he should carefully peruse all settlements and wills from beginning to end, in order that no clause that can possibly affect the title may escape. As to the suspicion arising from the non-production of copies of court rolls, see *Whitbread* v. *Jordan*, 1 Y. & C. Ex. 303. With respect to the liability of the purchaser's solicitor for any loss arising from his neglect to render perfect the abstract on which he takes counsel's opinion, see *Ireson* v. *Pearman*, 5 Dowl. & Ry. 687; 3 B. & C. 799; *Wilson* v. *Tucker*, 3 Star. 154.

As to parcels.

Although it is always the province of counsel to trace the identity of the parcels in the different deeds, yet the purchaser's solicitor should examine

(*y*) "This examination should never be left to an incompetent person:" Sugd. Vend. 411.

into this matter, for which he has often peculiar facilities, with as much care as if the entire responsibility rested on himself; as it is a point in respect of which too much caution cannot be exercised.

Evidence necessary to verify the Abstract.

Deeds abstracted must be proved by production of the originals. Where the title-deeds were destroyed by fire, after they had been examined by the purchaser's solicitor, but before the title was accepted; it was held, that the vendor could not enforce specific performance, without furnishing the purchaser with the means of proving the contents of the deeds, and that they were duly executed and delivered. Of the former, it was admitted that the abstract, having been verified by the purchaser's solicitor, might be evidence; but to prove the latter, the vendor was held bound to produce the attesting witnesses: *Bryant* v. *Busk*, 4 Russ. 1. But this is seldom now required, where a deed comes from proper custody, except under special circumstances: Dart, V. & P. 312. See also *Man* v. *Ricketts*, 7 Beav. 93; *Doe* v. *Michael*, 15 Jur. 677. A deed is considered to be in proper custody when in the possession of a person, with whom it may reasonably be expected to be found: *Croughton* v. *Blake*, 12 M. & W. 205; *Doe* v. *Phillips*, 8 Q. B. 158.

Loss of deeds after abstract delivered, and before conveyance.

Where the deeds are on or near the locality of the estate, or of the notorious residence of the vendor, it seems that the purchaser must bear the expense of any journey his solicitor may have to take to examine them; and if they are in London, a country solicitor is bound, even as between himself and his own client, to instruct his agent in London to examine the deeds, according to the usage of the profession, and cannot charge for the expenses of his own journey for that purpose: *Alsop* v. *Ld. Oxford*, 1 Myl. & Kee. 564. But where the deeds are in the hands of persons residing in different parts of the country, the purchaser's solicitor is not bound to send the abstract to an agent in a country town, in order that he may compare them with the deeds, but the vendor must be at the expense of his journeys for that purpose: *Hughes* v. *Wynne*, 8 Sim. 85. See *Sharpe* v. *Page*, Sugd. Vend. 430; *Rawlins*

Examination of abstract where deeds are at a distance.

Evidence necessary to verify the Abstract.

v. *Vincent*, Carth. 124. This rule, however, no longer applies as regards the production of documents not in the vendor's possession. See sect. 3 (6) of the Conveyancing and Law of Property Act, 1881 (stated *post*, p. 158, note (*h*)).

Where the vendor covenanted to produce a good title, and verify the abstract by the production of all the deeds, &c. at Norwich, at Lynn, or in London, on or before a certain day; it was held, that he was bound to give notice to the purchaser at which place he would be ready to produce the deeds, &c.: *Rippingall* v. *Lloyd*, 2 Nev. & M. 410. When the vendor has a covenant for the production of the deeds, he must himself obtain them for the inspection of the purchaser; for if the purchaser went to inspect the deeds, the holder might refuse to produce them to him, and would not be liable to an action of covenant for the non-production: *Per* Taunton, J., Id. 419. Although a mortgagee is not generally liable to produce his title-deeds until payment of the debt (*Posthlewaite* v. *Blythe*, 3 Mad. 242; *Sparke* v. *Montriou*, 1 Y. & C. Ex. 103; *Brown* v. *Lockhart*, 10 Sim. 420; and see *Latimer* v. *Neate*, 4 Cl. & F. 570, and the observations of the Vice-Chancellor on that case, in *Brown* v. *Lockhart*), yet if he has consented to a sale by the Court, he has so far taken upon himself the character of a vendor, that he must bring into Court all deeds necessary for the purposes of the sale: *Livesey* v. *Harding*, 1 Beav. 343.

Mortgagor's liability to produce deeds.

Conditions as to production of deeds.

Where the vendor stipulated, by his fourth condition of sale, that he would "deduce a good title," with certain exceptions there mentioned; and by the sixth condition, that he would "deliver up to the purchaser of the greater part in value of the said estates, all the title-deeds and copies of deeds, and other documents in his custody, but should not be found or required to *produce* any original deed, or other documents than those in possession and set forth in the abstract, or which relate to other property:" it was held, that the vendor was bound to verify his abstract in the usual manner: *Southby* v. *Hutt*, 2 My. & C. 207.

Evidence necessary to verify the Abstract.

The purchaser's solicitor is justified in comparing the deeds with the abstract and searching for judgments, &c., before he submits the title to counsel, as otherwise much unnecessary expense would be incurred; and if the title turns out to be bad, the seller must pay the expenses of such examination and searches: *Hodges* v. *E. of Litchfield*, 1 Scott, at p. 449. As to what expenses the purchaser cannot recover, where the sale goes off for defect of title, see *S. C.*, and *Flureau* v. *Thornhill*, 2 W. Blackst. 1078; *Jarmain* v. *Eyelstone*, 5 Car. & Pay. 172; *Walker* v. *Moore*, 10 B. & Cr. 416; amongst these are costs *preliminary to the contract*, as, commission for negotiating the purchase, &c.: *Hodges* v. *E. of Litchfield*, *ubi sup.* If the purchaser has died pending the contract, the expenses incurred in his lifetime are recoverable by his personal representative, and not by his heir, the loss having accrued to the personal estate: *Orme* v. *Broughton*, 4 Moo. & Sc. 417. The expenses of investigating the title cannot be recovered, unless a written contract is proved, although money paid by way of deposit, or for the auction duty, may: *Gosbell* v. *Archer*, 4 Nev. & Man. 485; 2 Ad. & El. 500.

Examination, when to be made.

Expense, by whom borne where sale goes off.

As to the conclusions that are to be drawn from the non-production of the deeds, and in particular from notice that they are in the possession of third persons, *vide infra*, sub tit. "MORTGAGES," and *Farrow* v. *Rees*, 4 Jur. 1028. Wherever this is the case, inquiries should be made of the holders of the deeds respecting the nature of their interest, care being taken to inform them of the pending contract of purchase. Similar inquiries should be made of tenants and persons in possession, or the counterparts of the leases under which they hold should be inspected, in order to ascertain whether there are any unusual terms by which the purchaser would be bound: *Taylor* v. *Stibbert*, 2 Ves. jun. at p. 440; *Daniels* v. *Davison*, 16 Ves. 249; *Allen* v. *Anthony*, 1 Mer. 282; *Taylor* v. *Baker*, Dan. 71; *Wilbraham* v. *Livesey*, 18 Beav. 206. But a purchaser is not bound to inquire of a person whom he knows to have been lately in possession, but who has quitted previously to the sale, with intention to abandon possession:

Caution where deeds in possession of third person.

Inquiries to be made of tenants, &c.

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Holmes v. *Powell*, 8 De G., M. & G. 572; *Miles* v. *Langley*, 1 Russ. & Myl. 39.

Purchaser should inquire into the terms of existing leases or tenancies of which he has notice.

It was formerly considered that notice to a purchaser of the existence of a lease or tenancy is notice of the contents of such lease, or the terms of such tenancy. Thus, if it were stated that the premises were in lease for a certain term, and the purchaser made no farther inquiry, and it afterwards turned out that the lessee had a covenant for renewal, the purchaser would be bound by that covenant. See *Bailey* v. *Richardson*, 9 Ha. 734; *Wilbraham* v. *Livesey*, 18 Bea. 206; *Cavander* v. *Bulteel*, L. R., 9 Ch. 79.

Inquiries to be made of tenants.

And the rule has even been carried to this extent, that where notice was proved against a purchaser, of the fact of the lands being in the occupation of a tenant, and he made no further inquiry, and it turned out, that the lessee had himself a contract for the purchase of the estate, the purchaser was held to be affected with notice of, and therefore to be bound by, that contract: *Daniels* v. *Davison*, 16 Ves. 249. This is a very important doctrine, and should put purchasers on their guard. The contracts in *Daniels* v. *Davison*, was subsequent to, and quite distinct from, the instrument by which the tenant became lessee. The principle would, of course, apply to those cases in which the lease contains a clause of preemption: *Taylor* v. *Stibbert*, 2 Ves. jun. 437: *Hall* v. *Smith*, 14 Ves. 426; and see 16 Ves. 254. The doctrine that notice of a tenancy is, as between vendor and purchaser, notice of the tenant's equities, was acted upon by Romilly, M.R., in *James* v. *Lichfield* (L. R., 9 Eq. 51), and by the Court of Common Pleas in *Phillips* v. *Miller* (L. R., 9 C. P. 196), but the latter decision was reversed in the Exchequer Chamber (L. R., 10 C. P. 420); and in the case of *Caballero* v. *Henty*, (L. R., 9 Ch. 447), the Lords Justices (affirming the decision of Jessel, M.R.), held that a purchaser is not bound to ascertain from the vendor's tenant the terms of his tenancy. James, L. J., at p. 450, said: "The doctrine in question (*i.e.*, as to notice) seems to me to refer to equities between the

purchaser and the tenant when the legal estate has passed, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, 'If you had gone to the tenant and inquired you would have found out all about it.'" But although a vendor may not in such a case be able to impose specific performance where lands are described in particulars, or a contract for sale, as being held by lease, the purchaser should not be satisfied without seeing a copy of the lease; and where the statement simply is, that there is a tenant, the purchaser should ascertain the nature of his interest, and the terms under which he holds; for by those terms he will be bound (*z*).

Evidence necessary to verify the Abstract.

Inquiries to be made of tenants.

It often occurs that leasehold property is sold subject to an apportioned part of a larger rent. In such cases the vendor must prove that a valid apportionment has been effected (*a*). In *Barnwell* v. *Harris* (1 Taunt. 430), it appeared, that the messuage in question, with other houses, was built upon land demised in 1764, at £28 rent, and that the owner of the rent had, for more than twenty years, accepted £2 a-year rent for these premises. The purchaser brought an action for his deposit on an objection to the title, founded on the liability of the premises to the larger rent. Mansfield, C. J., left it to the jury to consider, whether the rent had been apportioned

As to property being sold subject to an apportioned part of a larger rent.

(*z*) That is to say, as between himself and the tenant, if the purchase is completed.

(*a*) By sect. 3 of the stat. 22 & 23 Vict. c. 35, it is enacted, that "Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for nonpayment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him."

Evidence necessary to verify the Abstract.

by the act of the landlord; and they found for the plaintiff. The Court refused to disturb the verdict, being of opinion that the vendor was bound to adduce evidence of the apportionment, and could not oblige the purchaser to rely upon an apportionment being presumed from the payment for twenty years of the smaller rent; for, admitting such presumption to be clear in the absence of all evidence, it might be rebutted by contrary evidence. In the case of *Bowles* v. *Waller*, Hayes, at p. 441, the receipts of a Crown collector was held to be sufficient evidence of apportionment.

Inquiries where property is vested in trustees.

If the subject-matter to which the title relates is property vested in trustees, it will be necessary to make inquiries of the trustees, whether any incumbrance on the property has come to their knowledge, as well as to give them notice of the intended dealings with it. There is less occasion for this precaution where the subject is a freehold or chattel interest in realty (*Jones* v. *Jones*, 8 Sim. 633); but in common honesty, as well as prudence, it should be adopted indifferently in all cases. Priority of notice gives priority of equity; and if the vendor had himself purchased the trust or taken the charge, which is being sold, it will not be an objection to his title, that he omitted to give notice to the trustees, if it appear that no subsequent purchaser or incumbrancer has done so. "The object of notice is to exclude a subsequent purchaser and incumbrancer on the fund; and if it can be shown that no subsequent party has come in, then the fact, that notice has not been given, would not, as it seems to me, be an essential blot on the title. It is, however, necessary that full means should be afforded of most carefully inquiring whether notice has or has not at any time been given to the trustees:" *Per* Lord Langdale, M. R., *Hobson* v. *Bell*, 2 Beav. at p. 23. And see, as to notice, *Wiltshire* v. *Rabbits*, 14 Sim. 76; *Rooper* v. *Harrison*, 2 K. & J. 86; *Lee* v. *Howlett*, ibid. 531; *Re Hughes' Trusts*, 2 H. & M. 89; *Foster* v. *Cockerell*, 3 Cl. & F. 456.

In the case of a sale by trustees under a power, the consent of the tenant for life is now rendered

necessary by sect. 56 of the Settled Land Act, 1882. Before accepting such a title, it should be ascertained that this consent has been obtained, and the concurrence of the tenant for life, or of all the tenants for life, if more than one, in the conveyance should be required, for the purpose of confirming the same, and signifying assent thereto (*a*). Such sales are in great measure superseded by the statutory powers of disposition over settled land given by that act to limited owners.

Evidence necessary to verify the Abstract.

The purchaser's solicitor, in calling for documents or other evidence, must take care that he does not insist on more than he is entitled to (*b*); for where a purchaser had called for more than the vendor was bound to furnish, and the vendor, considering that the purchaser would not be satisfied with what he was entitled to, had not afforded the necessary information; specific performance was decreed, on a good title being made out, without costs on either side: *Newall* v. *Smith*, 1 Jac. & W. 263. See *Southby* v. *Hutt*, 2 My. & C. 207, and stated, *ante*, p. 92.

What requisitions purchaser's solicitor should make.

The purchaser's solicitor must be careful not only to satisfy himself by proper evidence of the facts material to the title, but to procure from the vendor such documents as can be obtained, in order that there may be no difficulty in proving the title on a future sale. For it has been held, that the covenant for further assurance (*c*) does not entitle a purchaser,

Covenant for further assurance does not entitle a purchaser to further evidence of title.

(*a*) As to infant tenants for life, see sect. 60 of the Act; as to married women, see sect. 61; and as to lunatics, see sect. 62. See also *post*, tit. "AGREEMENTS," notes to Precedent III.

(*b*) Where a purchaser made the following requisition: "Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?" it was held, by the Court of Appeal, that neither the vendors nor their solicitor were bound to give any answer to the requisition: *Re Ford and Hill*, 10 Ch. D. 365. But it is still the practice of many conveyancers to ask this question, so as more completely to throw the responsibility on the vendor in case anything is kept back; sometimes an observation is made to the same effect as "I assume there is not to the knowledge of the vendor," &c.

Inquiry as to incumbrances.

(*c*) A covenant for further assurance is now implied in all conveyances when the party conveying is expressed to convey "as beneficial owner:" 44 & 45 Vict. c. 41, s. 7 (1).

Evidence necessary to verify the Abstract.

who has neglected to obtain evidence of facts material to his title at the time of his purchase, afterwards to call for the production of such evidence, or to have the future preservation and production of the documents containing the evidence secured to him: *Hallett* v. *Middleton*, 1 Russ. 243, 256. So, if the purchaser has omitted to take a covenant for the production of deeds, he cannot, under the covenant for further assurance, require the vendor to enter into such a covenant. See *Fain* v. *Ayres*, 2 Sim. & St. 533. But he may, it seems, where he has sold part of the estate, and parted with the original conveyance, obtain a counterpart from his vendor, under the covenant for further assurance: *Napper* v. *Lord Allington*, 1 Eq. Ca. Ab. 166, pl. 4.

As to supplying defects of title, &c., after the completion of the contract.

But though little encouragement is given to a purchaser, who goes into court after the completion of his purchase, to repair the consequences of his own negligence by seeking to obtain that which he should have required at the time; the case is different where the purchaser's omission has been induced by fraud: *Edwards* v. *M'Leary*, G. Coop. 308; and in a case where the vendors represented that a will had been duly proved, which afterwards was discovered not to be the fact: Sir W. Grant decreed (with the consent of certain legatees, who were interested in the will, and were parties to the suit) that the will should be deposited with the Master; and that the vendors, whose misrepresentation, though probably *unintentional*, had caused the necessity for the suit, should pay all the costs: *Harrison* v. *Coppard*, 2 Cox, 318.

Searches in register office, court rolls, &c.

The purchaser's solicitor should, of course, search the register office when the lands are in a register county; and, when they are of customary tenure, the court rolls, which form a species of registry. As to the question, whether the court rolls are notice to a purchaser, see *Pearce* v. *Newlyn*, 3 Mad. 186; *contra Bugden* v. *Bignold*, 2 Y. & C. 377; see also *Hansard* v. *Hardy*, 18 Ves. 462; and see also Sugd. Vend. 780, the better opinion seems to be that they are not, unless the purchaser makes searches extending over the period comprising the entry (see *Hodgson* v. *Dean*, 2 Sim. & St. 221; aff.

on app. Sugd. Vend. 761); in which case either registers or court rolls will be notice. In some manors, surrenders of copyholds made out of court may be presented at any time, and a second incumbrancer, who has searched the rolls, does not gain priority over the first by an earlier inrolment of the surrender to himself, or of his own admittance. He is considered to be acquainted with the custom: *Horlock* v. *Priestley*, 2 Sim. 75. It may often be advisable to search the rolls of the Central Registry for assurances inrolled under the provisions of the Fines and Recoveries Act, and also the index of the certificates of acknowledgments of married women under the same Act.

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Inquiry should also be made in the case of copyholds or customary freeholds, as to the customs of the manor with regard to permitting entails, the granting of leases, descent, &c., also as to fines, heriots, and quit or other rents.

Inquiry as to custom of the manor.

The duty of searching for incumbrances of course devolves upon the purchaser's solicitor, he having been apprised by his counsel advising upon the title by what incumbrances the estate is liable to be affected. Complete safety is only to be found in searching for every such incumbrance, though the list of them is somewhat formidable, comprising writs of execution registered under 23 & 24 Vict. c. 115, and 27 & 28 Vict. c. 112, judgments, Crown debts, accountantships to the Crown, decrees, orders, *lis pendens*, registered under 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11, and annuities and rent charges registered under 18 & 19 Vict. c. 15, recognizances, annuities, and rent charges registered under earlier acts, and for adjudications in bankruptcy, and deeds of composition; also the county registers and court rolls of the manor, where necessary, and in some cases for drainage and land improvement loans, at the office of the land commissioners(*d*). Sometimes it may be prudent to ascertain the non-existence of all these. Often, however, the rank and situation in

As to searching for incumbrances.

(*d*) The office of the Land Commissioners is at No. 3, St. James' Square.

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life of the parties are such as to render the precaution with respect to some of the points of inquiry superfluous. For instance, no person would think of searching the bankrupt office, where the vendor was a person of known opulence and respectability; but, unless in very obvious cases of this kind, the searches should be made; or, if they be omitted at the desire of the purchaser himself, his solicitor should obtain his written authority for dispensing with them. The responsibility often incurred by the neglect of this precaution is very serious; the effect is to transfer the risk from the purchaser himself to the solicitor, though the sole object of the latter in avoiding the search may have been to prevent expense to his client. See *Brooks* v. *Day*, 2 Dick. 572; *Ireson* v. *Pearman*, 5 Dowl. & Ry. 687 (*d*). Probably, few persons would be disposed to press their claim under such circumstances; but a prudent man will scarcely be satisfied to rest his security on the existence of an honourable feeling of this kind.

In the case of a vendor, who is simply seised in fee, the purchaser's first concern will be to ascertain the non-existence of judgments against him, and of writs of execution issued thereunder.

Judgments.

The search for judgments extended formerly to judgments against all the persons to whom the property has successively devolved for a long series of years (say twenty or thirty), commencing, not from the time at which they severally acquired the estate, but at the remotest period at which judgments might have been entered up against them. At common law only the goods and chattels of a debtor and the growing produce of his lands could be seised by a creditor on a judgment, but by the Statute of Westminster 2 (13 Ed. 1, st. 1, c. 18), the creditor was entitled to take in execution one moiety of the debtor's lands (*e*). For an account of the state of the law with regard to judgments before

(*d*) See also *Whiteman* v. *Hawkins*, 4 C. P. D. 13, which was a case of negligence in not requiring the production and delivery of certain deeds affecting the property.

(*e*) Estates tail, copyholds and advowsons in gross were not extendible under this statute: 3 Bac. Abr. 382; 3 Co. 9; *Ashburnham* v. *St. John*, Cro. Jac. 85.

the year 1838, reference may be made to Prideaux on Judgments, pp. 1—57; Sugd. Vend. pp. 516 *et seq.*, and Dart, V. & P. pp. 457 *et seq.* In that year the stat. 1 & 2 Vict. c. 110, was passed, by which it was enacted that—

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Stat. 1 & 2 Vict. c. 110.

Sect. 11. "It shall be lawful for the sheriff or other officer to whom any writ of elegit, or any precept in pursuance thereof, shall be directed at the suit of any person, upon any judgment which at the time appointed for the commencement of this Act shall have been recovered, or shall be thereafter recovered, in any action in any of her Majesty's Superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit."

Sheriff may deliver execution of lands, &c., to judgment creditor.

Sect. 13. "A judgment already entered up or to be hereafter entered up against any person in any of her Majesty's superior courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the

Judgment to operate as a charge on real estate.

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person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon. Provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment . . . . nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up unless such judgment shall have been entered up one year at least before the bankruptcy . . . . Provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice."

With regard to the above sections Lord St. Leonards observes: "The enactment that the judgment shall operate as a charge upon the estate means a charge upon the beneficial interest of the debtor. If he has a legal estate, subject to an equity, it will be a charge upon the estate, subject to the same equity; in the case of an equitable interest, it will be a charge upon the equitable interest. Therefore an equitable mortgagee must be preferred to a subsequent judgment creditor, who will be prevented from executing his judgment as against the mortgagee although he had not notice of the mortgage when he obtained his judgment:" Sugd. Vend. p. 527; and see *Whitworth* v. *Gaugain*, 1 Phil. 728; 3 Ha. 416; *Kinderley* v. *Jervis*, 22 Beav. 1; *Benham* v. *Keane*, 1 J. & H. 685.

Bankruptcy.

The effect of the provision as to bankruptcy in sect. 13 of stat. 1 & 2 Vict. c. 110, is to give validity to judgments as equitable charges, notwithstanding the subsequent bankruptcy of the debtor, provided a year intervenes between the entering up of the judgment and the bankruptcy. A purchaser from a trustee in bankruptcy must in all cases search the central registry, commencing at a period of five years next preceding the time of his search, and carrying on the search from that time to the beginning of the year next preceding the bankruptcy. (See further on this subject, *infra*, p. 126.)

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The question was formerly much discussed whether leaseholds were bound by the judgments equally with freeholds under this Act; and in the last edition of this work a doubt was expressed upon this point. Lord St. Leonards considered that leaseholds were certainly bound, and his view, which was generally adopted by the profession, received judicial confirmation in the cases of *Harris* v. *Davison*, 15 Sim. 128, and *Avison* v. *Holmes*, 1 J. & H. 530 (*d*).

Stat. 2 & 3 Vict. c. 11.

In order that further protection might be afforded to purchasers against judgments, Crown debts and *lis pendens*, it was enacted by the stat. 2 & 3 Vict. c. 11:

Judgments after five years from registration to be void against lands, unless a fresh memorandum is left.

Sect. 4. "That all judgments of any of the superior courts, decrees or orders in any court of equity, rules of a court of common law, and orders in bankruptcy or lunacy, which since the passing of the said recited Act of the first and second years of the reign of her present Majesty have been registered under the provisions therein contained, or which shall hereafter be so registered shall after the expiration of five years from the date of the second entry thereof, be null and void against lands, tenements, and other hereditaments as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance, is again left with the senior master of the said Court of Common Pleas (*e*) within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring of the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration, or, as to creditors, within five years before the right of such creditors accrued, and so *toties quoties* at the expiration of every succeeding five years; and the senior master shall forthwith re-enter the same in like manner as the same was originally entered; and such officer shall be entitled for any such re-entry to the sum of one shilling."

Judgments duly registered not to affect purchasers, &c. otherwise than judgments of superior courts would

Sect. 5. "That as against purchasers and mortgagees without notice of any such judgment, decrees or orders, rules or orders as aforesaid, none of such judgments, decrees or orders, rules or orders, shall bind or effect any lands, tenements, or hereditaments, or any interest therein further or otherwise or more exten-

(*d*) 3rd edition of this work, vol. i. p. 107, and vol. v. p. 48; see also Sugd. Vend. p. 536.

(*e*) Now at the Central Office.

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sively in any respect, although duly registered, than a judgment of one of the superior courts aforesaid would have bound such purchaser or mortgagee before the said Act of the first and second years of the reign of her present Majesty, where it had been duly docketed according to the law then in force.

have done before 1 & 2 Vict. c. 110.

Stat. 3 & 4 Vict. c. 82.

The stat. 3 & 4 Vict. c. 82, after reciting the 14th sect. of the 1 & 2 Vict. c. 110, (which relates to a judgment debtor's stock in the funds, shares, &c.,) enacts—

Effect of judge's order in respect of debtor's stock, &c., standing in the name of the Accountant-General.

Sect. 1. "That the aforesaid provisions of the said Act shall be deemed and taken to extend to the interest of any judgment-debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and whenever any such judgment-debtor shall have any estate, right, title, or interest, vested or contingent, in possesion, remainder, or reversion, in, to or out of any such stock, funds, annuities, or shares as aforesaid, which now are or shall hereafter be standing in the name of the Accountant-General of the Court of Chancery (*d*), or the Accountant-General of the Court of Exchequer (*d*), or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment-debtor: Provided always, that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the Accountant-General of the Court of Chancery (*d*), or the Accountant-General of the Court of Exchequer (*d*), or as to the interest, dividends, or annual produce thereof, shall prevent the governor and company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery, or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment-creditor, with the amount of the sum to be mentioned in any such order" (*e*).

(*d*) Now the Paymaster-General, S. C. J. (Funds, &c.) Act, 1883 (46 & 47 Vict. c. 29).

(*e*) It may be observed, that the charge mentioned in the above enactment, will be subject to the doctrine of the cases of

Sect. 2. Reciting the provisions of the 19th section of the 1 & 2 Vict. c. 110, respecting the registry of judgments, &c., in the Common Pleas (*f*), and that doubts have been entertained, whether a purchaser, mortgagee, or creditor, *having notice* of any such judgment, decree, order, or rule as aforesaid, would not, in equity, be affected thereby, notwithstanding such a memorandum or minute of the same as in the said Act is mentioned may not have been left with the senior master of the said Court of Common Pleas (*f*), enacts, "That no such judgment, decree, order, or rule as aforesaid, shall, by virtue of the said Act, affect any lands, tenements, or hereditaments, at law or in equity, *as to purchasers, mortgagees, or creditors*, unless and until such a memorandum or minute as in the said Act in that behalf mentioned, shall have been left with the senior master of the said Court of Common Pleas at Westminster (*f*), any notice of any such judgment, decree, order, or rule, to any such purchaser, mortgagee, or creditor, in anywise notwithstanding."

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No judgment, decree, &c., to affect real estate as against purchasers, mortgagees, and creditors, *with notice*, until memorandum left with senior master of the Common Pleas.

Doubts having arisen with regard to the interpretation of the preceding statutes (see *Freer* v. *Hesse*, 4 De G., M. & G. 495), it was provided by the stat. 18 & 19 Vict. c. 15:

Sect. 4. "That no judgment, decree, order, or rule, which might be registered under the said Act of the first and second years of her Majesty, shall affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said Act in that behalf mentioned shall have been left with the proper officer of the proper court any notice of any such judgment, decree, order, or rule, to any such purchaser, mortgagee, or creditor, in anywise notwithstanding."

By sect. 5, "the provisions of 3 & 4 Vict. c. 82, s. 3, are

Stat. 18 & 19 Vict. c. 15. Judgments, &c., which may be registered under 1 & 2 Vict. c. 110, shall not affect lands, &c., as to purchasers, &c., notwithstanding notice until registered with the proper officer of the proper court.

Dearle v. *Hall*, 3 Rus. 1; *Loveridge* v. *Cooper*, Ib. 30, &c. (*infra*, tit. "MORTGAGES"), respecting notice to trustees; and that therefore a purchaser of an equitable interest in stock, &c., has no occasion to take any precaution against judgments, &c., beyond that of making the usual inquiries of the trustees. But where the stocks, &c., are standing in the name of the vendor himself, the central registry should be searched, as a measure of precaution. But it is to be remembered, that the provision for registry in the 1 & 2 Vict. c. 110, and that in the 2 & 3 Vict. c. 11, requiring a fresh memorandum to be entered every five years, only contemplate "lands, tenements, and other hereditaments."

(*f*) Now the Central Office. Central Office Practice Rules, 1880, 1881, 1882.

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extended. Notice of judgments not registered not to avail against purchasers, &c. of lands, tenements, or hereditaments."

Sect. 6. "Where by the said Act of the second and third years of her Majesty re-registry of judgments, decrees, orders, or rules, is required within such period of five years as is therein mentioned, in order to bind purchasers, mortgagees, and creditors, it shall be deemed sufficient to bind such purchasers, mortgagees, and creditors, if such a memorandum or minute as was required in the first instance is again left with the senior master of the Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest, in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditors accrued, as directed by the said last-mentioned Act, although more than five years shall have expired by effluxion of time since the last previous registration before such last-mentioned memorandum or minute was left, and so *toties quoties* upon every re-registry."

No estate vested in a purchaser or mortgagee for valuable consideration shall be taken in execution or rendered liable under any judgment against or Crown debt be due from any mortgagee who shall have been paid off before or at the execution of the conveyance to such purchaser, &c.

Sect. 11. "Where any legal or equitable estate, or interest, or any disposing power, in or over any lands, tenements, or hereditaments shall under any conveyance or other instrument executed after the passing of this Act become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements, or hereditaments, shall not be taken in execution under any writ of elegit, or other writ of execution, to be sued upon any judgment, or any decree, order, or rule, against any mortgagee or mortgagees thereof who shall have been paid off prior to or at the time of the execution of such conveyance, nor shall any such judgment, decree, order, or rule, or the money thereby secured, be a charge upon such lands, tenements, or hereditaments, so vested in purchasers or mortgagees, nor shall such lands, tenements, or hereditaments, so vested in purchasers or mortgagees be extended or taken in execution, or rendered liable, under any writ of extent or writ of execution, or other process issued by or on behalf of her Majesty, her heirs, or successors, in respect of any judgment, statute, or recognizance obtained against or entered into by, or inquisition found against, or obligation or specialty made by, or acceptance of office by, any mortgagee or mortgagees, whereby he or they hath or have become or shall become a debtor or accountant or debtors or accountants to the Crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance as aforesaid.

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By the statute 22 & 23 Vict. c. 35, s. 11, it is enacted that—

Release of part of land charged not to affect judgment.

"The release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice nevertheless to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or confirming the release."

Stat. 23 & 24 Vict. c. 38.

By the statute 23 & 24 Vict. c. 38, s. 1, it is enacted—

Writs of execution of judgments to be registered.

"That no judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) as to a bonâ fide purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee have notice or not of any such judgment, statute or recognizance) unless a suit or other due process of execution of such judgment, statute or recognizance shall have been issued and registered as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: Provided always that no judgment, statute or recognizance to be entered up after the passing of this Act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure, as to a bonâ fide purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered."

Sect. 2 prescribes the mode of registering. It is to be observed that this Act does not include creditors, and therefore a registered judgment creditor will still have priority over a simple contract creditor as regards land.

As to entry of satisfaction on judgments.

By the statute 23 & 24 Vict. c. 115, s. 2, it is provided that the senior master of the Court of Common Pleas at Westminster (now the Central Office) may, upon the filing with him of an acknowledgment in the form or to the effect prescribed, be at liberty to enter a satisfaction or discharge as to any registered judgment, pending suits *lis pendens*, decree, order, rule, annuity, or rentcharge, or writ

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of execution, and such officer is thereby authorized to issue certificates of such entry, and to charge certain fees for such registry, and for issuing certificate thereof.

Stat. 27 & 28 Vict. c. 112.

The statute 27 & 28 Vict. c. 112, after reciting that it was desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that effecting purely personal estates in respect of future judgments, &c., enacts (sect. 1) that—

Future judgments, &c., not to affect land until land delivered in execution.

"No judgment, statute or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute or recognizance."

Interpretation of terms. Registration.

By sect. 2, "land" is defined as including all hereditaments, corporeal or incorporeal, or any interest therein: and by sect. 3, it is provided that writs of execution shall be registered in the manner prescribed by 23 & 24 Vict. c. 38.

Creditor to whom land delivered in execution entitled to obtain summary order from Court of Chancery for sale.

By sect. 4, it is enacted that every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, statute or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land; and every such petition may be served upon the debtor only; and thereupon the Court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries and generally in carrying into effect such order for sale, the practice of the said Court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable.

Sect. 5 provides that where there are other creditors whose debt is a charge on the land, "*whether prior or subsequent to the charge of the petitioner*," notice of sale shall be served on them. The Act does not extend to Ireland.

Effect of this statute.

The construction of this statute is somewhat obscure, and has given rise to considerable difference of opinion among the learned judges who have had

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occasion to interpret it. At first sight, the provisions of the Act would appear necessarily to mean that no future judgments should operate as a charge on land, unless the land is capable of being delivered, and has actually been delivered in execution. But, on the other hand, the language of the preamble, the terms of the definition of land, and the words in sect. 5, above italicized, seem irreconcilable with such a construction, the effect of which would be by mere implication to deprive judgment creditors of their remedies under the stat. 1 & 2 Vict. c. 110. In the case of *Re Cowbridge Rail. Co.*, L. R., 5 Eq. at p. 416, Wood, V.-C., said that this could not have been intended, but that "the intention must have been simply that all those remedies which a judgment creditor can effect by means of a writ of elegit must be exercised by him before he can come in under the Act." And in a subsequent case Gifford, V.-C., expressed his opinion that no person could apply by petition under the Act, unless he had actually got that which was equivalent to being put in possession; that is, a return to the writ actually placed in the hands of the sheriff: *Guest* v. *Cowbridge Rail. Co.*, L. R., 6 Eq. 622.

But in the case of *Re Duke of Newcastle*, L. R., 8 Eq. 700, Lord Romilly, M. R., expressed serious doubts whether the 13th section of 1 & 2 Vict. c. 110, had not been virtually repealed by this Act, and he dismissed a petition for sale of an equitable interest in a leasehold house on the ground that the application was met by the insuperable difficulty that the property must be actually delivered, which, in this case, it had not been and could not be.

However, in the later case of *Hatton* v. *Haywood*, L. R., 9 Ch. 229, the Court of Appeal adopted a more liberal construction, and decided where a judgment debtor has only an equitable interest which is incapable of delivery in execution, the creditor should apply to the court for an order vesting in him the debtor's estate, which order will be a delivery in execution within the meaning of the Act. Lord Selborne, C., said: "Although the statute is not worded with the exactness desirable in Acts

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of Parliament, yet, on the face of it, we have that which shows that the ordinary legal process was not the only mode of obtaining delivery of the land contemplated, for we have the words 'or any other lawful authority.' Any lawful authority which could cause such a delivery as the subject-matter was capable of, seems to me to satisfy the language of the statute; and in any case in which the judgment creditor must have come into equity to remove a legal impediment, the judgment and execution issued being the foundation of his right, it appears to me the relief given is substantially a delivery in execution, whether in form it be a writ of assistance or of sequestration, or the appointment of a receiver. In my opinion that would be quite sufficient, and the court would be necessarily bound by the order." This decision was followed in *Re South*, L. R., 9 Ch. 369: see also *Wells* v. *Kilpin*, L. R., 18 Eq. 298, and for a fuller examination of this question than is here possible, see Dart, V. & P. 476 *et seq.*

Lastly, by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), it is enacted:

Official negative and other certificates of searches for judgments, Crown debts, &c.

Sect. 2. "(1) Where any person requires, for the purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any Act described in Part I. of the First Schedule to the Conveyancing Act of 1881 (*e*), or by

(*e*) Part 1 of the First Schedule of the Conveyancing Act, 1881, referred to in this section is as follows:—

1 & 2 Vict. c. 110, "An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England."

2 & 3 Vict. c. 11, "An Act for the better protection of purchasers against judgments, Crown debts, lis pendens, and fiats in bankruptcy."

18 & 19 Vict. c. 15, "An Act for the better protection of purchasers against judgments, Crown debts, cases of lis pendens, and life annuities or rent charges."

22 & 23 Vict. c. 35, "An Act to further amend the law of property and to relieve trustees."

23 & 24 Vict. c. 38, "An Act to further amend the law of property."

23 & 24 Vict. c. 115, "An Act to simplify and amend the

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any other Act, he may deliver in the office a requisition in that behalf, referring to this section.

"(2) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

"(3) In favour of a purchaser (*f*), as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

"(4) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

"(5) General Rules (*g*) shall be made for purposes of this

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practice as to the entry of satisfaction on Crown debts, and on judgments."

27 & 28 Vict. c. 112, "An Act to amend the law relating to future judgments, statutes, and recognizances."

28 & 29 Vict. c. 104, The Crown Suits, &c. Act, 1865.

31 & 32 Vict. c. 54, The Judgments Extension Act, 1868.

(*f*) By sect. 1 of the Act: "Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser."

(*g*) The following are the rules under sect. 2 of this Act, and the Appendix thereto:—

1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made, pursuant to sect. 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the appendix purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under sect. 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix,

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section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein; which Rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.

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and the certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstances may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate; a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be endorsed on the original certificate, and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The endorsement shall be in the Form XII. in the Appendix, with such modifications as circumstances may require.

5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

APPENDIX.

Form I.

Declaration by Separate Instrument as to Purposes of Search.

Supreme Court of Judicature.
Central Office.
To the Clerk of Enrolments,
or The Registrar of
Royal Courts of Justice.
London.

In the matter of A. B. and C. D.

I declare that the search [*or* searches] in the name [*or* names] of , required to be made by the requisition for search dated the , is [*or* are] required for the purposes of a sale [*or* mortgage, *or* lease, *or as the case may be*], by A. B. to C. D.

{ Signature,
{ Address and Description.

Dated .

Form II.

Declaration as to Purposes of Search contained in the Requisition.

I declare that the above-mentioned search is required for the purposes of a sale [*or* mortgage, *or* lease, *or as the case may be*], by A. B. to C. D.

any time after the passing of this Act, to take effect on or after the commencement of this Act.

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(6) "If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation

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FORM III.

Requisition for Search in the Enrolment Office, under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature.
Central Office.
Requisition for Search.
To the Clerk of Enrolments,
Royal Courts of Justice,
London.
In the matter of A. B. and C. D.

Pursuant to sect. 2 of the Conveyancing Act, 1882, search for deeds and other documents enrolled during the period from 18 , to 18 , both inclusive in the following name [*or* names].

Surname.	Christian name or names.	Usual or last known place of abode.	Title, trade, or profession.

[*Add Declaration Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address and description of person requiring the search.

Dated .

FORM IV.

Requisition for Search in the Bills of Sale Department under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature.
Central Office.
Requisition for Search.
To the Registrar of Bills of Sale,
Royal Courts of Justice,
London.
In the matter of A. B. and C. D.

Pursuant to sect. 2 of the Conveyancing Act, 1882, search for instruments registered or re-registered as bills of sale during the

Evidence necessary to verify the Abstract.

to any certificate or office copy under this section, he shall be guilty of a misdemeanor.

period from 18 , to 18 , both inclusive in the following name [*or* names].

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade or Profession.

[*Add Declaration Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address, and description of person requiring the search.

Dated .

FORM V.

Requisition for Search in the Registry of Certificates of Acknowledgment of Deeds by Married Women under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature.

Central Office.

Requisition for Search.

To the Registrar of Certificates of Acknowledgments of Deeds by Married Women.

Royal Courts of Justice,

London.

In the matter of A. B. and C. D.

Pursuant to sect. 2 of the Conveyancing Act, 1882, search for Certificates of Acknowledgments of Deeds by Married Women during the period from 18 , to 18 , both inclusive, according to the particulars mentioned in the schedule hereto.

THE SCHEDULE.

Surname.	Christian name or names of Wife and Husband.	Date of Certificate if the search relates to a particular Certificate.	Date of Deed if the search relates to a particular Deed.	County, Parish, or Place in which the Property is situate, or other description of the Property.

[*Add Declaration Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address, and descripton of person requiring the search.

(7) "Nothing in this section or in any Rule made thereunder shall take away, abridge, or prejudicially affect any right which

Evidence necessary to verify the Abstract.

FORM VI.

Requisition for Search in the Registry of Judgments under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature.
Central Office.

Requisition for Search.

To the Registrar of Judgments,
Royal Courts of Justice,
London.

In the matter of A. B. and C. D.

Pursuant to sect. 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules, and *lis pendens*, and for judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office for the period, from 18 , to 18 , both inclusive, and for executions for the period from the 29th July, 1864 [*or as the case may require*], to the , 18 , both inclusive, and for annuities for the period from the 26th April, 1855 [*or as the case may require*], to the , 18 , both inclusive, in the following name [*or* names].

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade or Profession.

[*Add Declaration Form II.*]

[*State if an office copy of the certificate is required and whether it is to be sent by post or called for.*]

Signature, address, and description of person requiring the search.

Dated .

FORM VII.

Certificate of Search by Enrolment Department under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature.
Central Office.
Enrolment Department.

Certificate of Search pursuant to sect. 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Enrolment Office for deeds and other documents in the name [*or* names] of , for the period from to , both inclusive, and that no deed or other document has been enrolled in the said office in that name [*or* in any one or more of those names], during the period aforesaid , *or*, and that except

Evidence necessary to verify the Abstract.

any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such Rule had not been enacted or made.

(8) "Where a solicitor obtains an office copy certificate of

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the described in the schedule hereto, no deed or document has been enrolled in that name [*or* in any one or more of those names] during the period aforesaid.

The Schedule.

Dated .

FORM VIII.

Certificate of Search by the Registrar of Bills of Sale under the Conveyancing Act, 1882.

Supreme Court of Judicature.

Central Office.

Bills of Sale Department.

Certificate of search pursuant to sect. 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Register of Bills of Sale in the name [*or* names] of , for the period from 18 ; to 18 , both inclusive, and that no instrument has been registered or re-registered as a bill of sale in that name [*or* in any one or more of those names] during that period , *or*, and that except the described in the schedule hereto, no instrument has been registered or re-registered as a bill of sale in that name [*or* in any one or more of those names] during the period aforesaid.

The Schedule.

Dated .

FORM IX.

Certificate of Search by Registrar of Certificates of Acknowledgments of Deeds by Married Women under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature.

Central Office.

Registry of Certificates of Acknowledgments of Deeds by Married Women.

Certificate of search pursuant to sect. 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Office of the Registrar of Certificates of Acknowledgments of Deeds by Married Women in the name [*or* names] of for the period from to 18 , both inclusive, for a certificate dated the *or* for certificates of acknowledgment of a deed dated the *or* for certificates of acknowledgments of deeds to [*fill in the description of the property from the Requisition*], and that no such certificate has been filed in that name [*or* in any one or more of those names] during the period aforesaid, *or* and that except the certificate [*or* certificates] described in the Schedule

result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

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(9) "Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

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hereto, no such certificate has been filed in that name [*or* in any one or more of those names] during the period aforesaid.

Schedule.

Surname.	Christian names of Wife and Husband.	Date of Certificate.	Date of Deed.	County, Parish, or Place in which Property situated, or other description of Property.

Dated day of 188 .

FORM X.

Certificates of Search by Registrar of Judgments under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature.

Central Office.

The Registry of Judgments.

Certificate of Search pursuant to sect. 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the office of the Registrar of Judgments for judgments, revivals, decrees, orders, rules, *lis pendens*, judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office for the period from , 18 , to , 18 , both inclusive, and for executions for the period from 18 , to , 18 , both inclusive, and for annuities for the period from 18 , to , 18 , both inclusive, in the name [*or* names] of and that no judgment, revival, decree, order, rule, *lis pendens*, judgments at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name [*or* in any one or more of those names] during the respective periods covered by the aforesaid searches , *or* and that except the mentioned in the Schedule hereto, no judgment revival, decree, order, rule, *lis pendens*, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution or annuity, has been registered or re-registered in that name [*or* in any one or more of those names] during the respective periods covered by the aforesaid search.

The Schedule.

Dated the day of 18 .

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(10) "Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

(11) "Nothing in this section applies to deeds enrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory Rule.

(12) This section does not extend to Ireland."

3 & 4 Will. 4, c. 74.

What search to be made.

The search in the registry will commence with the commencement of the five years next pending the time of the search. This search will disclose all judgments, rules, decrees, orders, and *lites pendentes;* which last are indexed in a separate book. Wherever it is expedient to search for judgments against any

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FORM XI.

Requisition for Continuation of Search under the Conveyancing Act, 1882.

Supreme Court of Judicature.
Central Office.

Requisition for Continuation of Search.

To the Clerk of Enrolments, *or*
The Registrar of the Royal Courts of Justice.
London, W.C.

In the Matter of A. B. and C. D.

Pursuant to sect. 2 of the Conveyancing Act, 1882, continue the search for [ ], made pursuant to the requisition dated the day of 18 , in the name [*or* names] of , from the day of 18 , both inclusive.

{ Signature, address and description of person requiring the search.

Dated .

FORM XII.

Certificate of result of Continued Search under the Conveyancing Act, 1882, *s.* 2, *to be Endorsed on Original Certificate.*

This is to certify that the search [*or* searches] mentioned in the within written certificate has [*or* have] been diligently continued to the day of 18 , and that up to and including that date [except the mentioned in the schedule hereto, *these words to be omitted where nothing is found*], no deed or other document has been enrolled, *or* no instrument has been registered, or re-registered, as a bill of sale, *or* no certificate has been filed, *or* no judgment, revival, decree, order, rule, *lis pendens*, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity, has been registered or re-registered, in the within mentioned name [*or* in any one or more of the within-mentioned names].

Dated .

Evidence necessary to verify the Abstract.

other person than the vendor (*i*), the search should not be dispensed with on the ground that such person has no interest in the premises within the five years preceding the time of search; for the right of a judgment-creditor may be kept alive for a much larger period. But the search, in no case, need be carried back more than five years.

1. If it appears by the register that a judgment was entered up before the 23rd of July, 1860, and has been since duly registered, the purchaser will be bound by it, although no writ of execution may have been issued or registered.

2. If a judgment is disclosed which was entered up after the 23rd of July, 1860, but before the 29th of July, 1864, search must be made in the name of the creditor as appearing in the index for a registered writ of execution; and if such writ be found, it must be ascertained whether execution was put in force within three calendar months after the writ was issued. But if no execution should appear on the register, or if three months should have expired since the registration without the writ having been put in force, a purchaser may safely disregard the judgment and execution.

3. If it appears that a judgment was entered up since the 29th of July, 1864, the purchaser should search the list of registered executions under the stat. 27 and 28 Vict. c. 112 (*k*), and if no execution has been registered at the time of completion of the purchase, the judgment will not affect the land, and may be disregarded.

Inasmuch, however, as a purchaser searching for judgments has notice of undiscovered incumbrances

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(*i*) Where the vendor has obtained the property by devise or descent, or where from any other circumstance it is probable that there was no search made for judgment against the former owner, such search should now be made.

(*k*) It is obvious that if the age of the vendor or mortgagor is such that a judgment could not have been obtained against him, on or before this date, this search is the only one necessary as regards judgment. But in cases where the vendor or mortgagor is suspected to be in embarrassed circumstances it may be prudent immediately before completion, to ascertain whether there is any writ in hands of the sheriff. (Wolst. Conv. Acts, 3rd ed. p. 133.)

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(*Procter* v. *Cooper*, 2 Dr. 1), it will be well for his solicitor to obtain an official certificate which is conclusive, instead of searching himself.

Search in respect of equitable interest.

The search is equally necessary in the case of a purchaser of an equitable as of a legal estate. Previously to the 1 and 2 Vict. c. 110, equitable interests were not bound at law before execution was sued out. When the purchased interest is merely equitable, and the purchaser can obtain a declaration of trust from the trustee—or where, in case the legal freehold is bought, he can get in an available term, he may dispense with a search for judgment, although he will still be liable to the danger of executions being sued out before the purchase is completed. And if he intends to rely for protection upon an outstanding legal estate, of course he will take care not to acquire notice by any search.

Land in counties palatine.

Where the lands are in either of the counties palatine of Lancaster or Durham, it will be necessary to search in the registry of the Palatine Court, as well as in the Central Registry, for the Supreme Court has jurisdiction within the counties palatine: 2 Wms. Saund. 194; 11 Geo. 4 and 1 Will. 4, c. 70, s. 13; see 4 & 5 Will. 4, c. 62; 1 Cr., Mee. and Ros. 597, 848; and see per *Jessel*, M. R., in *Re Alison's Trusts* (C. A.), 8 Ch. D. 1, and *Longendale, &c. Co.*, Ibid. 150. The Courts Palatine are not named in the stat. 2 & 3 Vict. c. 11, s. 4; but the omission is supplied by 18 & 19 Vict. c. 15 (*l*).

(*l*) By this statute judgments in the Court of Common Pleas of the County Palatine of Lancaster, and the Court of Pleas of the County Palatine of Durham (the jurisdiction of both Courts was removed to the High Court of Justice as from the 1st Nov. 1875, by the Judicature Act, 1873, s. 16), are not binding upon lands in such Counties Palatine "as to purchasers, mortgagees or creditors," unless they are registered and re-registered in the prothonotary's book in manner prescribed by the Act (sects. 1, 2, 3 and 9). By sect. 2 the 18th, 19th and 20th sects. of 1 & 2 Vict. c. 110, apply, *mutatis mutandis*, "to the Counties Palatine and the Courts of Common Law thereof respectively, and to the Court of Chancery of the County Palatine of Durham." The provisions of the Judgments Acts were applied to the Court of Chancery of the County Palatine of Lancaster by the 13 & 14 Vict. c. 43, s. 24.

By 18 & 19 Vict. c. 15, s. 7, judgments removed from inferior courts to the Court of Common Pleas of Lancaster are not binding unless registered as if originally entered there.

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Judgments do not affect lands in the register counties as against purchasers *without notice*, unless registered in the county registry. See the several Acts, and *Hine* v. *Dodd*, 2 Atk. 275; *Le Neve* v. *Le Neve*, 3 Atk. 646; *Tunstall* v. *Trappes*, 3 Sim. 301; and see *Davis* v. *Earl of Strathmore*, 16 Ves. at p. 427. In Middlesex, judgments bind lands from the time of the entry of the memorial, 7 Anne, c. 20, s. 19. In the North Riding, registry within *twenty* days after the acknowledgment and signing of the judgment is as good as registry on the very day, 8 Geo. 2, c. 6, s. 33; and in the East and West Ridings, and in Kingston-upon-Hull, the acts allow *thirty* days: 6 Anne, c. 20, s. 13; 6 Anne, c. 62, s. 28: see also, stats. 2 and 3 Anne, c. 4, and 8 Geo. 2, c. 6. There is a separate index for judgments in the offices for Yorkshire, but not in that for Middlesex.

Search for judgments where lands in register county.

Lis pendens.

The doctrine of *lis pendens* was very fully considered in the case of *Bellamy* v. *Sabine* (1 De G. & J. 566), the circumstances of which were shortly as follows: J. B., a tenant for life, sold his life estate to E. B. his son, the tenant in tail in remainder: E. B. suffered a recovery, and sold the land to G. in fee; E. B. died, and F. B. his brother and heir-at-law, who but for the recovery would have been tenant in tail of the property, filed a bill against J. B. and G. to set aside the sales for fraud. G., *pendente lite*, mortgaged the property to A. The bill was dismissed as against J. B., but the decree set aside the sale to G. After the decree J. B., who had not received the purchase-money in respect of the sale of his life estate, filed a bill against G., F. B., and A., for specific performance of his contract with E.B., and the question arose as to whether A., as mortgagee, took in priority; it was held, by *Wood*, V.-C.,

By sect. 9, the prothonotaries of the Court of Common Pleas, and Court of Pleas of the Counties Palatine respectively, are the persons who, for the purposes of registration of County Palatine judgments, take the place of the senior master of the Court of Common Pleas at Westminster under the Acts amended.

By the Judicature Act, 1873, s. 78, the existing prothonotaries and other officers of those Courts respectively, and their successors, shall (subject to any Rules of Court to be made in future under that section) perform their duties as at the commencement of that Act.

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that the mortgagee's claim must be postponed: but on appeal this decision was reversed. Lord *Cranworth*, C., after reviewing the earlier cases, said: "The language of the court in these cases certainly is to the effect that *lis pendens* is implied notice to all the world. I confess, I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is, that *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent." And *Turner*, L. J., said, p. 584: "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a court of equity as to implied or constructive notice. It is, as I think, a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this foundation,—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding . . . . No case, so far as I am aware, has yet occurred in which the doctrine has been applied so as to affect the title of the alienee of a defendant by virtue of a claim not interfering with the title of the plaintiff in the pending litigation . . . . If this decision be right, and an alienee of a defendant is by virtue of this doctrine of *lis pendens*, to be affected by the claim of a co-defendant, upon what principle is the alienee to be protected from the claim of a mere stranger? . . . . . If the doctrine of *lis pendens* is to be carried so far as to affect a purchaser with notice in favour of a stranger, I hardly know what title could be safe, independently of the late Acts requiring registration;" he added that these observations were not to be taken to have any reference to cases where there is notice independently of the *lis pendens*.

The later case of *Tyler* v. *Thomas*, (25 Beav. 47), was a creditor's administration suit where the deficiency of the the testator's personal estate for pay-

Evidence necessary to verify the Abstract.

ment of his debts was payable out of two real estates devised to two separate persons, Judith and Thomas; the debts were ordered to be paid by sale of Judith's estate, without prejudice to her rights of contribution against Thomas: four years after the order the suit was registered as a *lis pendens*, and subsequently Thomas mortgaged his estate to G., who had no notice of the suit: Romilly, M. R., held that the mortgagor could only give to his mortgagee pending the suit such title as he had, and that, this suit being registered, he could only give a title subject to the equitable rights which had been declared by the Court. It will be observed that in this case a distinct decree had been made before the *lis pendens* was registered, and that the mortgage was subsequent to the registration, which appears to distinguish the case from *Bellamy* v. *Sabine*. But see Sugd. Vend. 758.

A *lis pendens*, though not in itself an incumbrance, is notice of any charge or claim which is the subject of the action. A search of the register should never be dispensed with, but if it should appear that the action does not affect the property intended to be purchased, the purchaser may safely disregard the *lis pendens*, and could not refuse to complete by reason of it: *Bull* v. *Hutchins*, 32 Beav. 615; *S. C.*, 9 Jur., N. S. 954.

If an action is pending for the administration of a trust estate, a sale of land subject to the trust cannot be made without the leave of the Court: *Walker* v. *Smallwood*, Amb. 676; but a decree for administration without any injunction or appointment of a receiver does not deprive an executor of his power of dealing with the assets: *Berry* v. *Gibbons*, L. R., 8 Ch. 747.

By the stat. 2 & 3 Vict. c. 11, s. 7, it is enacted:

> That no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court of Equity and the title of the cause or information, and the day when the

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bill or information was filed, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens;* and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions thereinbefore contained in regard to the re-entering of judgments every five years, and the fee payable to the officer thereon (*h*), shall extend to every case of *lis pendens* which shall be registered under the provisions of this Act.

The search need therefore only be carried back for five years. Whether it should be made against the vendor or mortgagor alone, or against other persons shown by the abstract to have been interested in the property must depend on the circumstances of the case, and particularly upon whether or not it is to be reasonably concluded that the proper searches were efficiently made when the property was last dealt with (*i*). A search for *lis pendens* is the only search generally necessary against trustees or mortgagees. As to mortgagees who have been paid off see 18 & 19 Vict. c. 15, s. 11, *ante*, p. 106.

The search for *lis pendens* must be made in the Central Registry.

As to vacating a *lis pendens*, and entry of the discharge on the register, see stat. 30 & 31 Vict. c. 47, s. 2.

As to Crown debts.

Crown debts are next to be considered. Where the purchaser has reason to suspect that the vendor *is*, or that any other person through whom the title is derived, previously to his parting with the estate, *was* a Crown specialty debtor, search should be made in the proper offices for information on the point. Some persons, indeed, adopt the precaution of making the search, in regard to the vendor, as a matter of course; and this practice seems to be warranted by the consideration, that persons often be-

(*h*) See sect. 4 of this Act, stated, *ante*, p. 105.

(*i*) This will apply equally to searches for judgments and other incumbrances. See on this point *Benham* v. *Keene*, 1 J. & H. 685.

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come bound to the Crown in the character of sureties, who are not concerned in the payment or receipt of the public revenue. The stat. 2 & 3 Vict. c. 11, s. 8, provides that after the 4th of June, 1839, future liabilities to the Crown shall be registered, and that until duly registered, they shall not affect the debtor's lands as to purchasers or mortgagees. And by sect. 22 of the stat. 22 & 23 Vict. c. 35, the provisions as to re-registry of judgments contained in 2 & 3 Vict. c. 11, and 18 & 19 Vict. c. 15, are, as from the 31st of December, 1859, extended so as to apply to Crown debts. It is, therefore, not now necessary to carry the search beyond five years.

By 28 & 29 Vict. c. 104, s. 48, it is provided that future Crown debts shall not affect land as against a purchaser or mortgagee, unless execution be issued and registered before purchase or mortgage, whether or not the purchaser or mortgagee has notice of the liability.

Sect. 49 prescribes the mode of registration.

It will be observed that no three months' limit is here imposed as in the case of judgments by 23 & 24 Vict. c. 38, *ante*, p. 107, so that the search for execution must generally be carried back to the commencement of the register.

This statute is not retrospective, so that search must still be made for liabilities to the Crown incurred before the 1st of November, 1865, and duly re-registered.

The Crown is not bound by the bankrupt laws; and, therefore, purchasers from assignees are not relieved from the necessity of ascertaining the non-existence of specialty Crown debts: *Attorney-General* v. *Aston*, 2 Mod. 247; Manning's Ex. Pr., 2nd ed. 33. The Middlesex and Yorkshire Register Acts do not extend to recognizances of the Crown.

As to accountants to the Crown.

Persons holding under the Crown offices which were in existence at the time of the stat. 13 Eliz. c. 4, are accountants within the meaning of that statute, and are, therefore, incapacitated from making a title to a purchaser, whether any debt is due to the Crown at the time of the conveyance, or not, as the land would be affected by debts subsequently con-

Evidence necessary to verify the Abstract.

tracted: *King* v. *Bishop of Sarum*, Moo. 126, pl. 274; *Nicholls* v. *How*, 2 Vern. 389.

As to who are liable as accountants to the Crown, see 33 Hen. 8, c. 39; 13 Eliz. c. 4; 6 Geo. 4, c. 105, s. 13; Shelford, R. P. Stat. 605.

All freehold lands are liable to be taken in execution by the Crown, and the lien binds trust estates (*Earl of Devonshire's Case*, 11 Rep. 92), and is not excluded by the exercise of a power of appointment: *Reg.* v. *Ellis*, 6 Ex. 921. An attendant term, even if held in trust for the debtor or accountant, affords no protection: *R.* v. *St. John*, 2 Pri. 317; *R.* v. *Lamb*, 13 Pri. 649. Though copyholds are generally exempt, the lien will attach to a lease of copyholds granted by licence of the lord: 1 Wat. Cop. 190 n. Where a tenant in tail, to whose estate the lien of the Crown attached under 33 Hen. 8, c. 39, s. 75, aliened the land *bonâ fide*, it was held that the Crown could not extend the lands in the hands of the alienee: *Lord Anderson's Case*, 7 Rep. 21.

Bankruptcy.

Bankruptcy, it is well known, disqualifies persons from contracting for the sale of, or conveying, their property. If the vendor, therefore, be supposed to be in embarrassed circumstances, the purchaser's solicitude will properly be directed to the rolls of the Court of Bankruptcy to ascertain whether the vendor's name appears therein (*k*). Persons dealing with a bankrupt without notice of the act of bankruptcy were formerly protected by the stats. 6 Geo. 4, c. 16, 2 & 3 Vict. c. 11, and 2 & 3 Vict. c. 29, as regards all transactions with the bankrupt *bonâ fide* entered into before the date of the fiat against him. These provisions were repealed but virtually re-enacted by the Bankruptcy Consolidation Act, 1849 (12 & 13 Vict. c. 106), and were continued in force by the Bankruptcy Act, 1861, and the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 95), rendered valid, notwithstanding any prior act of bankruptcy, any disposition or contract for the

(*k*) The search should be for at least five years back; it should strictly be for twenty years, but this is not usual in practice: Dart, V. & P. p. 498.

Evidence necessary to verify the Abstract.

disposition of property, by conveyance or otherwise, made by any bankrupt in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of the making of such disposition of property notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication. This Act is now repealed by the Bankruptcy Act, 1883, which enacts:

Restriction of rights of creditor under execution or attachment.

Sect. 45.—"(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

"(2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

As to searching for annuities.

No annuity or rent-charge granted since the 26th April, 1855 (otherwise than by marriage settlement), affects lands as to purchasers, mortgagees, or creditors until a memorandum thereof has been left with the Senior Master of the Court of Common Pleas at Westminster (now at the Central Office), who is to enter the particulars in a book in alphabetical order. The fee for entry is 2*s.* 6*d.* The book may be searched on payment of a fee of one shilling. See 18 & 19 Vict. c. 15, s. 12. An unregistered annuity is void against subsequent incumbrancers, whether they have notice of it or not: *Greaves* v. *Tofield*, 14 Ch. D. 563.

Arrears of annuity.

It is not enough to prove that an annuity affecting the property is expired; evidence should be adduced of its having been duly paid up to the time of its expiration: *Wynne* v. *Williams*, 5 Ves. 130. An annuity charged on land is "rent" within the meaning of the stat. 3 & 4 Will. 4, c. 42, and consequently only six years' arrears are recoverable: *Ferguson* v. *Livingstone*, 9 Ir. Eq. R. 202; *Francis* v. *Grover*, 5 Ha. 39.

Evidence necessary to verify the Abstract.

The place of search is the Central Registry. The search should be carried back to the date of the conveyance to the vendor, or to the date when he attained his majority, whichever last happened.

Dower.

When the fact to be ascertained is, whether a deceased person left a widow, his will should be looked into to see if mention is made of a wife: or, if he died intestate, it should be inquired to whom administration was granted. When a widow is proved to have been entitled to her dower, and is dead, it may still be prudent, in recent cases, to ascertain that there are no arrears of dower due. See *Wynne* v. *Williams*, 5 Ves. 130. Under sect. 4 of the Statute of Limitations, no arrears of dower are recoverable for more than six years. See *Bamford* v. *Bamford*, 5 Ha. 203.

Succession duty appears not to be, strictly speaking, an "incumbrance on property" (see *Bliss* v. *Putnam*, 7 Beav. 40); but by the stat. 16 & 17 Vict. c. 51, sect. 42, it is made a first charge on the estate of the successor and those claiming under him. Where, therefore, on a purchase, the property has devolved on the vendor since the 19th of May, 1853, the purchaser's solicitor should require the production of a receipt or certificate from the Inland Revenue Office, showing that all succession duty due in respect of such devolution has been paid, which will sufficiently exonerate a *bonâ fide* purchaser for value: see sect. 52.

On the sale of a reversionary interest or of property subject to a charge determinable on a death, the purchaser in the absence of stipulation becomes liable to the succession duty: *Cooper* v. *Trewby*, 28 Beav. 194. In the case of the purchase of a property in fee from a tenant for life and remainderman, or from a tenant for life exercising his statutory powers under the Settled Land Act, 1882, the land will be liable in the hands of the purchaser to the payment of succession duty on the death of the tenant for life, or annuitant, as the case may be (*l*).

(*l*) This will apparently apply, also, in future to a purchase from trustees with a power of sale, insomuch as the consent of the tenant for life is now in all cases necessary to the exercise of

Evidence necessary to verify the Abstract.

The purchaser should, therefore, require the duty to be commuted under sect. 41 of the Act, or to be provided for by indemnity, or abatement of the purchase money.

As to restraining purchaser from requiring evidence of facts anterior to a given period.

A point deserving consideration in framing conditions of sale, is, whether the purchaser should not be restrained from calling for evidence of extrinsic facts, as heirship, intestacy, death, &c., which are recited or taken notice of in deeds of a certain antiquity. The strict rule, it is conceived, is that the purchaser is entitled to require evidence of all facts material to the title, whether stated in deeds or not, occurring during the period for which an adverse claim might be sustained, *i.e.* for forty years. Such a rule, it is obvious, must often involve the vendor in great difficulties.

If the property has become distributed among numerous co-parceners, the amount of evidence may be greatly augmented, and the want of any one link in the pedigree is a fatal defect. It is not surprising, therefore, that vendors should be anxious to negative the purchaser's claim to evidence, the procuring of which is attended with much expense and difficulty. If the title has been investigated before the sale, the period of negation should be adapted to the circumstances of the title; if no such investigation has taken place, thirty years are generally fixed as the lapse of time, after which proof of a fact is to be dispensed with, probably by a kind of analogy to the rule (with which, however, it has no necessary connection), that a deed or will thirty years old proves itself; so as not to require that evidence should be given of its execution: *Doe* d. *Oldnall* v. *Deakin*, 2 Man. & Ry. 195. It was formerly considered that recitals were never evidence as against persons who were not parties to the deed (*m*), though where they were supported by

As to recitals being evidence.

their power, and consequently it is conceived, a purchaser must in such a case be necessarily affected with notice of the succession so as to deprive him of the protection given by sect. 52 of the Succession Duty Act.

(*m*) See *Doe* d. *Rogers* v. *Brooks*, 3 A. & E. 513. Recitals under seal are conclusive at law against the parties to the deed,

Evidence necessary to verify the Abstract.

long uninterrupted possession, and related to facts which must have been within the knowledge of the parties, especially if those facts are stated with the circumstances of time, place, &c., they might often safely be relied on. See *Neal* v. *Wilding*, 2 Str. 1151: *Banbury Peerage Case*, 6, 117, *S. C.* 1 Sim. & St. 153: *Devon Peerage Case*, by Nicolas, App. 44, 46; *Eccleston* v. *Petty*, Carth. 79; 2 Peake. See also *Fort* v. *Clarke*, 1 Russ. 601. Now, however, by the Vendors and Purchasers Act, 1874, sect. 2, recitals, &c., contained in instruments more than twenty years old are, unless and except so far as proved to be inaccurate, are to be taken as sufficient evidence of the facts stated as between an intending vendor and purchaser under an open contract: *Vide ante*, p. 53.

Recital in wills.

Recitals or descriptions contained in wills, even although annulled, are evidences of the same kind as recitals in deeds: *Doe* d. *Johnson* v. *Earl of Pembroke*, 11 East, 504; *Lisle Peerage*, by Nicolas, 53. A statement in a will of the place and time of birth of the testator's child, was held good *primâ facie* evidence of her age: *Vulliamy* v. *Huskisson*, 3 Y. & C. 80; *De Roos Peerage Case*, 2 Coop. 540. But when the evidence relates to real estate, the probate of a will is not admissible, even for this purpose, vide *post*, p. 167.

EVIDENCE OF HEIRSHIP.

Previously to considering the evidence which may be resorted to in making out a pedigree, it will be convenient to state concisely the rules of inheritance, as altered by the Act for the amend-

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and those having privity of estate claiming under them, and in actions between themselves may generally be relied on as estoppels, although not so pleaded: *Doe* d. *Pritchard* v. *Dodd*, 2 Nev. & M. 838; *Doe* d. *Brame* v. *Maple*, 5 Scott, 35. But a stranger cannot take advantage of an estoppel, unless he pleads it. *Bowman* v. *Rostran*, 2 A. & E. 283. The recital of a deed which is not produced can in no case be evidence of its contents and effect, beyond what its name and nature necessarily imply, unless its loss or destruction is proved. Burt, Comp. 7th Ed. p. 165.

ment of the law of inheritance 3 & 4 Will. 4, c. 106, amended by 22 & 23 Vict. c. 35, ss. 19, 20 (*n*). Evidence of Heirship.

Descent under the Stat. 3 & 4 *Will.* 4, *c.* 106.—The most important alteration in the law of inheritance which the statute of 3 & 4 Will. 4, c. 106, effected, was the abolition of the old rule "*seisina facit stipitem.*" The descent is to be traced from the purchaser; and the person last entitled (see sect. 1) to the land is to be considered as the purchaser, unless he can be shown to have inherited it. New law of descent. Descent, from whom traced.

The word "*purchase*" is defined in the first section to mean any acquisition "otherwise than by descent, or than by any escheat, partition (see Co. Litt. 177, b.), or inclosure, by the effect of which the land shall have become part of, or descendible in the same manner as, other lands acquired by descent." The claim of the lord by escheat seems to be in the same nature as a right of entry for condition broken, and is therefore descendible with the seignory. See Watk. Desc. 8.

In a case falling within the operation of this act, where a person of illegitimate birth purchased an estate which descended to his only child who died without issue and intestate, it was held that the estate must escheat rather than go to the son's collateral relations on the mother's side: *Doe* d. *Blackburn* v. *Blackburn*, 1 Mood. & Rob. 547. But now by sect. 19 of the stat. 22 & 23 Vict. c. 35, it is enacted that "where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend and the descent shall thenceforth be traced from the person last entitled to the land as if he had been the purchaser

(*n*) For a statement of the law as to descents and limitations previous to the year 1834, see the 3rd edition of this work (by Sweet), pp. 124—132; see also 2 Bl. Com. c. 14; Watkins' Essay on the Law of Descents and the late Mr. Joshua Williams' Lectures on Seisin, pp. 51—69.

Evidence of Heirship.

thereof." This provision is by sect. 20 incorporated in the stat. 3 & 4 Will. 4, c. 106.

Descent of a coparcener's share.

Where a coparcener dies intestate, leaving a son, the whole of her share descends to that son: *Cooper* v. *France*, 14 Jur. 214, *S. C.* 19 L. J., N. S. Ch. 313 (*o*). Real estate was devised to A. for life with remainder to B. in fee. B. died in 1821, leaving C. and D. coheiresses. C. died in 1824, in the lifetime of A. without having dealt with the property, leaving a son E. It was held that it was unnecessary to trace the descent as to C.'s moiety from B., but that E. must be taken as standing in C.'s place as regards her moiety: *Paterson* v. *Mills*, 19 L. J., Ch. 310.

Descent, how changed.

The class of purchasers within the second section is extended by the third, by virtue of which a devise by a testator to his heir (*p*), or a limitation in a conveyance, to the grantor or to his heirs, confers a new estate by purchase on the heir or grantor. Where in a conveyance the grantor takes the fee by way of resulting use, and not by express limitation, this enactment does not apply, and the grantor retains his old estate.

Limitation to the heirs of a stranger.

Formerly, if a stranger limited an estate to the heirs of a person, without giving any estate of freehold to that person, he who answered the description of heir at the time the limitation operated, took a fee by purchase, which was descendible to his own heirs, as if it had been limited to him by name and his heirs; so that if the limitation were to the heirs of a woman, and she died, leaving issue two daughters only, such daughters would have taken a fee (not in coparcenary, but in joint tenancy, or if words of severance were used, in common), descendible to their heirs collateral on the father's side:

(*o*) The question of the descent of the estates of coparceners under the new law appears to have given rise to much difference of opinion, and is fully discussed in the 3rd edition of this work at p. 140; also the opinion of the late Mr. Joshua Williams, in 10 Jur. 71—75, 112, 132, 160, 173, the substance of which is given in his treatise on Real Property, App. B. The judgment of Shadwell, V.-C., in the case above cited seems to have settled the point.

(*p*) It is doubtful whether this section applies to the case of a devise to an heir who disclaims all interest under the will, and enters as heir of the testator: *Bickley* v. *Bickley*, L. R., 4 Eq. 216.

Cr. Eliz. 431; 3 Lev. 127; 3 Leon. 35; 2 Sid. 53, 78. And for the same reason, a limitation of lands of gavelkind tenure, to the heirs of A., gave an estate by purchase to the eldest son of A. as heir at the common law: Co. Litt. 10, a; 1 Rep. 101; *Brown* v. *Barkham*, Pr. Ch. 461. But if the limitation were to the heirs special of any person, the estate descended in a *quasi* entail, to the persons who successively answered the description of heirs of the body of such person: Harg. Co. Litt. 13, a., 14, a.; Fearne, 82, 9th ed.: and if the limitation were to A. and his heirs on the part of the father, A. took a fee conditional on the existence of such heir: Co. Litt. 220. Where the ancestor, to whose heirs an estate is limited, himself takes an estate of freehold by the same conveyance, the well-known rule in *Shelley's case* operates to carry the fee to such ancestor.

Evidence of Heirship.

New law of descent.

Under the new law the descent in such cases is to be traced from the ancestor named, as if he had been the purchaser, whether the limitation is to the heir in fee-simple or to the heirs in tail (sect. 4). Where the limitation is of land which is subject to a customary descent the land passes to the heir at common law: *Sladen* v. *Sladen*, 2 J. & H. 369; *Thorp* v. *Owen*, 2 Sm. & G. 90; so also as regards Borough-English lands: *Polley* v. *Polley*, 31 Beav. 363.

Gift to heirs.

A. conveyed customary freeholds, which he had inherited from his mother, to B. in fee according to the custom of the manor. B., after surrender and admittance, executed a declaration of trust for such person as A. should by deed or will appoint, and in default for A. and his heirs, according to the custom of the manor. This process was necessary according to the custom to give the owner the power of devising. It was held that the descent had not been broken, and that the heir *ex parte maternâ* was entitled: *Nanson* v. *Barnes*, L. R., 7 Eq. 250.

The heir takes absolutely as devisee. The pecuniary legatees are not entitled to have the assets marshalled as against him: *Strickland* v. *Strickland*, 10 Sim. 374. See also *Biederman* v. *Seymour*, 3 Beav. 368.

Assets.

It was with reference to the common-law rule that

Evidence of Heirship.

New law of descent.

Alien ancestor.

descent could not be traced through an alien, that the doctrine of *immediate descent* from brother to brother became of importance, and that doctrine was established in opposition to the opinion of Sir Orlando Bridgman and two other judges in the case of *Collingwood* v. *Pace*, 1 Lev. 49; 1 Vent. 413; O. Bridg. 410, in which it was decided, that natural-born subjects, born of alien parents, might inherit to each other as not needing to trace the descent through their common parents. See Co. Litt. 8, a. By the stats. 11 & 12 Will. 3, c. 6, and 25 Geo. 3, c. 39, descent may be traced through alien parents, provided the person claiming through them is in existence and capable of taking at the death of the person last seised; but this exception does not prevent the divesting of an estate out of the daughter of an alien on the birth of a brother or sister (*q*),

Collateral descent.

and by sect. 5 of the Inheritance Act (3 & 4 Will. 4, c. 106), no person is to be considered as inheriting immediately from a brother or sister, but through a parent (*r*).

Lineal ascent.

By sects. 6 and 7 of the Inheritance Act (3 & 4 Will. 4, c. 106) lineal ancestors are made capable of inheriting to their issue in preference to collateral relations claiming through them (*s*), the male line of ancestors and their descendants being preferred to the female line; in accordance with the preceding clause, by which brothers and sisters are to be con-

Preference of remote male ancestor.

sidered as inheriting to each other, not immediately, but through their parent. Sect. 8 settles the question as to the relative claims of a grandfather's mother and her descendants, and a father's mother and her descendants, in favour of the former. See 2 Blackst. Com. 240: *Davies* v. *Lowndes*, 7 Scott, 21.

By sect. 9, that which would have flowed as a necessary consequence from the enactment of the

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(*q*) See as to the effect of the Naturalization Act, 1870, post, p. 145.

(*r*) As to the rule of descent under the old law as between brothers and their issue, the descendants of an attainted ancestor, see *Kynnaird* v. *Leslie*, L. R., 1 C. P. 389.

(*s*) The eviction of an uncle or nephew by the birth of a brother or sister, which might have happened under the old law, is thus rendered impossible. See Co. Litt. 11, b.

fifth section is modified, and relations of the half blood, while they are admitted to inherit, are postponed to relations of the same degree of the whole blood. This provision applies of course exclusively to the relations of the half blood to the persons from whom the descent is to be traced. Thus, if A. purchases and dies, leaving a son and daughters by a first wife, and a son by a second wife, and the eldest son enters and dies, his brother of the half blood shall succeed in preference to his sisters of the whole blood; for the younger son, though of the half blood to the person last seised, is not of the half blood to the purchaser, from whom the descent is traced.

Evidence of Heirship.

Half blood.

Sect. 10 allows a descent to be traced through a deceased person, notwithstanding his attainder(*t*).

Attainted ancestor.

The Act applies to all descents happening, and to all limitations contained in assurances made, or in wills of persons dying, after the 31st of December, 1833; and includes within its operation every kind of property, and every estate and right descendible to heirs, whether according to the common law of England, or by the custom of gavelkind, or Borough-English, or any other custom (sects. 1, 11, 12).

What cases are governed by the new law.

This Act is as follows:

Sect. 1 enacts "That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say), the word "*land*" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind, or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title, of entry, or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be

Stat. 3 & 4 Will. 4, c. 106. (Royal Assent, Aug. 29, 1883.) "*An Act for the Amendment of the Law of Inheritance.*"

Meaning of words in the Act; "Land."

(*t*) Attainders are now abolished as from the 4th July, 1870; stat. 33 & 34 Vict. c. 23, s. 1.

Evidence of Heirship.

in possession, reversion, remainder, or contingency; and the words "*the purchaser*" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "*descent*" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue, and the expression "*descendants*" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "*the person last entitled to land*" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "*assurance*" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

"The purchaser."

"Descent."

Sect. 2. "That in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this Act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same."

Last owner shall be considered to be the purchaser unless the contrary be proved.

Limitation to heir or grantor.—Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

Sect. 3. "That when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof."

Evidence of Heirship.

Sect. 4. "That when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land."

Limitation to heirs as purchasers.—Where heirs take by purchase under limitations to the heirs of their ancestor, descent to be traced as if the ancestor purchased.

Sect. 5. "That no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent" (*u*).

Brothers, &c., shall trace descent through their parent.

Sect. 6. "That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue."

Lineal ancestor may be heir in preference to collateral persons claiming through him.

Sect. 7. "That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendant shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed."

The male line to be preferred.

Sect. 8. "That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their

The mother of the more remote male ancestor to be preferred to the mother of the less remote male ancestor.

(*u*) See *Collingwood* v. *Pace*, O. Bridg. 410; 1 Vent. 413.

Evidence of Heirship.

descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants."

Half blood.—Half blood to inherit after the whole blood of the same degree.

Sect. 9. "That any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any such relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother" (*v*).

Attainder.—After the death of a person attainted, his descendants may inherit.

Sect. 10. "That when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died *before such descent shall have taken place*, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January one thousand eight hundred and thirty-four."

Act not to extend to any

Sect. 11. "That this Act shall not extend to any descent which

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(*v*) This clause is rendered obscure by an attempt at explanation or precision that would have been quite superfluous, had it preceded instead of following the 7th and 8th sections, which place the collateral relations next after the male ancestor from whom they derive that relationship, and which also provide, that the female ancestors are not to be resorted to until the male line is exhausted. By the 6th section, such female ancestor is to take in preference to her issue; from which it follows that (as all the descendants of a female ancestor who are of the whole blood to the *propositus*, are also descendants of the male ancestor, and must therefore have been already exhausted before the female ancestor is resorted to) her descendants of the half blood, being the only collateral relations left, must take *immediately* after her. In other words, the collateral relations of the half blood take *after* the common ancestor, whether male or female, by virtue of the express enactment in section 6; they take also after the collateral relations in the same degree of the whole blood, by the enactment of the 9th section; and because, before the female ancestor can be resorted to, there must be a failure of collateral relations of the whole blood, they take *immediately* after her. See the annexed table.

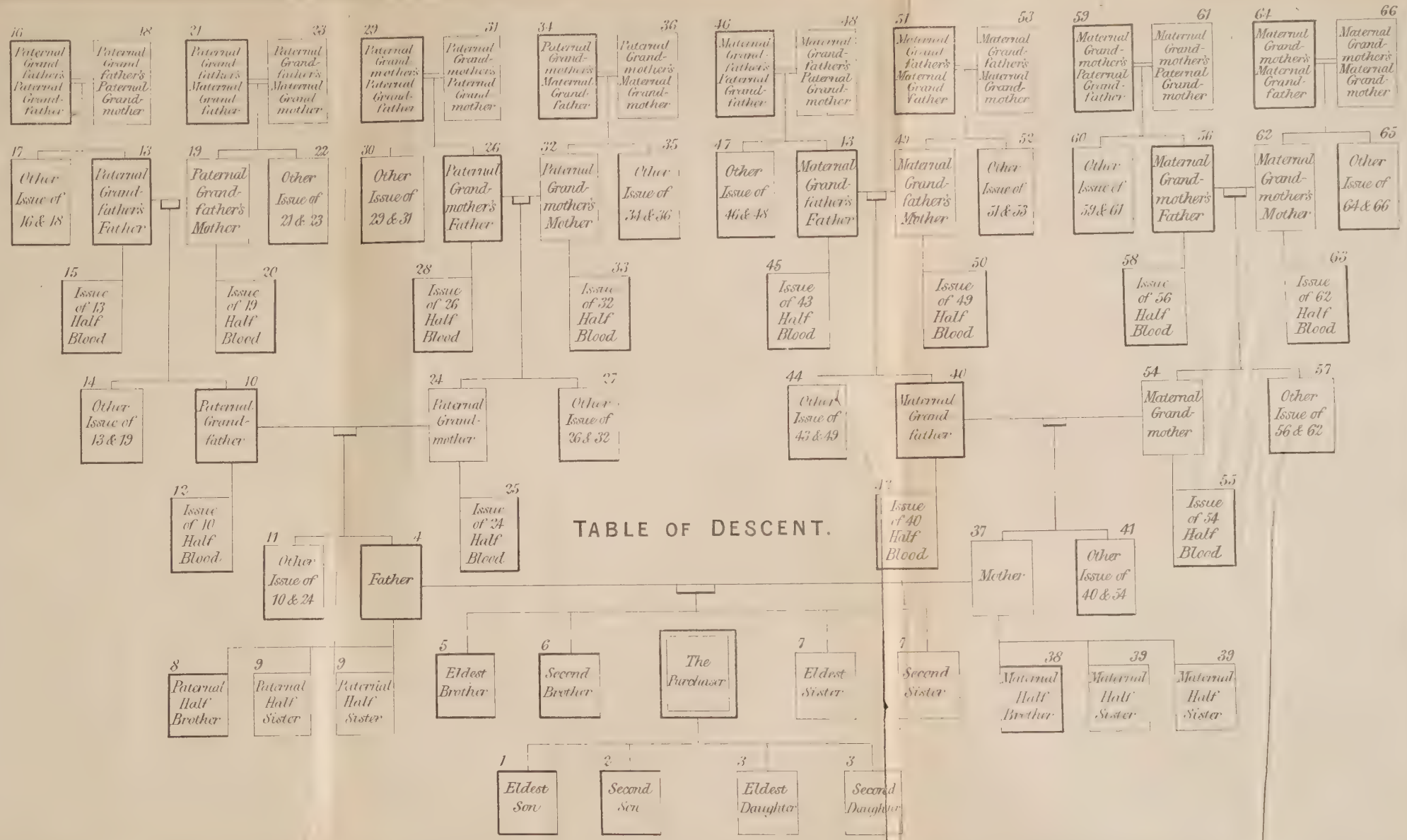
TABLE OF DESCENT.
16 Paternal Grand Father's Paternal Grand-father
18 Paternal Grand-father's Paternal Grand-mother
21 Paternal Grand-father's Maternal Grand-father
23 Paternal Grand-father's Maternal Grand-mother
29 Paternal Grand-mother's Paternal Grand-father
31 Paternal Grand-mother's Paternal Grand-mother
34 Paternal Grand-mother's Maternal Grand-father
36 Paternal Grand-mother's Maternal Grand-mother
46 Maternal Grand-father's Paternal Grand-father
48 Maternal Grand-father's Paternal Grand-mother
51 Maternal Grand-father's Maternal Grand-father
53 Maternal Grand-father's Maternal Grand-mother
59 Maternal Grand-mother's Paternal Grand-father
61 Maternal Grand-mother's Paternal Grand-mother
64 Maternal Grand-mother's Maternal Grand-father
66 Maternal Grand-mother's Maternal Grand-mother
17 Other Issue of 16 & 18
13 Paternal Grand-father's Father
19 Paternal Grand-father's Mother
22 Other Issue of 21 & 23
30 Other Issue of 29 & 31
26 Paternal Grand-mother's Father
32 Paternal Grand-mother's Mother
35 Other Issue of 34 & 36
47 Other Issue of 46 & 48
43 Maternal Grand-father's Father
49 Maternal Grand-father's Mother
52 Other Issue of 51 & 53
60 Other Issue of 59 & 61
56 Maternal Grand-mother's Father
62 Maternal Grand-mother's Mother
65 Other Issue of 64 & 66
15 Issue of 13 Half Blood
20 Issue of 19 Half Blood
28 Issue of 26 Half Blood
33 Issue of 32 Half Blood
45 Issue of 43 Half Blood
50 Issue of 49 Half Blood
58 Issue of 56 Half Blood
63 Issue of 62 Half Blood
14 Other Issue of 13 & 19
10 Paternal Grand-father
24 Paternal Grand-mother
27 Other Issue of 26 & 32
44 Other Issue of 43 & 49
40 Maternal Grand-father
54 Maternal Grand-mother
57 Other Issue of 56 & 62
12 Issue of 10 Half Blood
25 Issue of 24 Half Blood
42 Issue of 40 Half Blood
55 Issue of 54 Half Blood
11 Other Issue of 10 & 24
4 Father
37 Mother
41 Other Issue of 40 & 54
8 Paternal Half Brother
9 Paternal Half Sister
9 Paternal Half Sister
5 Eldest Brother
6 Second Brother
The Purchaser
7 Eldest Sister
7 Second Sister
38 Maternal Half Brother
39 Maternal Half Sister
39 Maternal Half Sister
1 Eldest Son
2 Second Son
3 Eldest Daughter
3 Second Daughter

To face p. 139.

shall take place on the death of any person who shall die before the said first day of January one thousand eight hundred and thirty-four."

Evidence of Heirship.

descent before 1st Jan. 1834.

Sect. 12. "That where any assurance executed before the said first day of January one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this Act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January one thousand eight hundred and thirty-four."

Limitations made before the 1st Jan. 1834, to the heirs of a person then living, shall take effect as if the act had not been made.

The annexed Table of Descent shows the order in which, under the present law, an estate inherited from the purchaser by any one of the individuals included in the Table would descend from that individual.

Table of descent.

Customary Descents.—The descent of copyhold lands is invariably regulated by the custom of the manor (*w*); and even in regard to freeholds, the general rule of descent admits of exceptions; of which the most considerable occur in the cases of lands held by the tenure of gavelkind; which, whether purchased in fee-simple or in fee-tail, and whether in possession, remainder, or reversion, descend to all the sons in equal shares, corresponding with the course of descent by the general law among females (Litt. sect. 265; Dyer, 179, pl. 45); and of burgage tenements held by the tenure of Borough-English, which go to the youngest son. See *Lutwyche* v. *Lutwyche*, Forr. 976; Litt. sect. 603. Between the two customs there is this material

Customs of gavelkind and Borough-English.

(*w*) It must be borne in mind that the statute 3 & 4 Will. 4, c. 106, applies to copyholds, as also to lands held by custom of gavelkind or borough-English or any other custom: *vide ante*, p. 135.

Evidence of Heirship.

Collaterals.

difference, gavelkind extends to brothers, and other collateral relations, *Godfrey* v. *Bullock*, Roll. Ab. 623, pl. 3; Id. 780; Co. Litt. 140, a.; 2 Watk. Cop. 313; Rob. Gav. 3 Ed. 115; Borough-English does not. Hence, if a person seised of lands held by the tenure of Borough-English, dies without issue, leaving brothers, the eldest, according to the general law, and not the youngest, as by the custom, will inherit: see *Doe* d. *Goodwin* v. *Spray*, 1 T. R. 466; Watk. Des. 97; Com. Dig. *borough-English*; Co. Litt. 110, b.; Cro. Car. 411; Roll. Ab. 624; and so, if a custom is found that lands shall descend to all the *sons*, it shall not be extended to let in all the brothers, for that would be to interpret the finding as of a custom that lands shall descend *after the manner of gavelkind*. See *Ratcliffe* v. *Chaplin*, 4 Leon. 242; *Clements* v. *Scudamore*, 1 P. Wms. 63; 2 Lord Raym. 1024; Salk. 243; *Payne* v. *Barker*, O. Bridg. 18; *Doe* d. *Foster* v. *Sisson*, 12 East, 62; *Locke* v. *Colman*, 1 My. & Cr. 423. But descents in tail are impliedly governed by a custom affecting descents in fee-simple: *Doe* d. *Garrod* v. *Garrod*, 2 B. & Ad. 87; *Trash* v. *Wood*, 4 My. & Cr. 324; Harg. Co. Litt. 10, a., n. 3. The descent of an equitable interest follows that of the legal estate as soon as the trust is executed; but while it is executory, the common-law heir is entitled: *Roberts* v. *Dixwell*, 1 Atk. 609; *Hale* v. *Hale*, cit. in *Clements* v. *Scudamore*, 2 Lord Raym. 1024.

Customary descent.

Representation, &c.

The right of the issue as representing their parents is recognized in descents according to Borough-English as well as gavelkind, and in customary descents generally. See *Clements* v. *Scudamore*, *ubi sup.*; *Blackburne* v. *Graves*, 1 Mod. 102; *Crump* v. *Norwood*, 7 Taunt. 362 (*x*). And the doctrines which apply

(*x*) Where the custom of a manor was that the copyholds descended to the youngest son or daughter, brother or sister, uncle or aunt, and a tenant died intestate leaving no such relatives, it was held that a surviving youngest son of the youngest uncle who left sons was not entitled, but that the lands devolved on the heir at law: *Smart* v. *Smart*, 18 Ch. D. 165.

to coparceners at the common law govern also descents in gavelkind, which are indeed nothing else than descents in coparcenary: Co. Litt. 175, b. Thus, the entry of one heir in gavelkind was the entry of his co-heirs: Co. Litt. 253, b. Evidence of Heirship.

The interest of an unadmitted surrenderee of copyhold descendible in gavelkind or Borough-English is descendible according to the custom: *Barker* v. *Dereham*, cited 1 Vent. 261; 1 Mod. 102 (*y*). But a special custom, regulating the descent of the land of every *tenant dying seised*, was held not to apply to the case of a surrenderee dying before admittance: *Hale's case*, cit. 1 P. Wms. 65; Salk. 243; *Payne* v. *Barker*, O. Bridg. 18. Admittance.

The customs of gavelkind and Borough-English apply to heirs named as special occupants: Co. Litt. 110, b.; Salk. 244; Lord Raym. 1028; 2 Vern. 226. Special occupancy.

It appears that the half blood was formerly excluded in customary descents, as much as at common law: Rob. Gav. 131. Half blood.

As to the distinction taken between conditions in gross and conditions incident to a reversion, that the former, when they relate to lands in gavelkind, &c., can only be taken advantage of by the heir at common law, though for the benefit of the customary heir, see the authorities cited, Rob. Gav. 159, and 2 Prest. Abst. 427. Conditions.

Lands of gavelkind tenure do not escheat upon an attainder for murder (*z*), but descend to the heir free from the king's claim to a year, day, and waste, according to the proverb— Escheat.

> "The father to the bough,
> And the son to the plough;"

a custom which applies to descent from brother to brother as well as from father to son. And the widow is dowable. But if the accused person does not submit to his trial, but is outlawed, the custom

(*y*) See further as to inheritance to copyhold according to borough-English, *Muggleton* v. *Barrett*, 2 H. & N. 653; *S. C.* 27 L. J., Ex. 125.

(*z*) Attainders were abolished by 33 & 34 Vict. c. 23, s. 1. *Vide post*, p. 147.

Evidence of Heirship.

does not prevent escheat, or deprive the king of the year, day, and waste: Rob. Gav. b. 2, ch. 4. This

Gavelkind.

custom (except, perhaps, in one or two places) applies to gavelkind lands out of Kent: Ib.

Rent-charges.

Rent-charges granted out of lands in gavelkind before the time of memory, are descendible according to the custom, and so, of course, are rents of modern creation, when incident to the reversion. But whether a rent-charge newly created, and not incident to any reversion, is descendible to the heir at common law, or to the customary heir, has been disputed. Principle seems to be in favour of the common-law heir, but the weight of authority is against his claim. See *Randal* v. *Writtle*, 2 Lev. 87; 1 Freem. 105, 345; 3 Keb. 165, 214; *S. C.* 1 Vern. 489, cit., and Rob. Gav. 101. Where one rent-charge is granted out of lands descendible at common law, and lands in gavelkind, on the death of the grantor, the rent shall not be apportioned, but all shall go to the heir at common law: Id. 106. But it is otherwise of a rent-service reserved out of lands of different tenure, for there the reversion being divisible, the rent which is incident to it shall be apportioned: Co. Litt. 148, a., 215 a.; 4 Rep. 120, b.; Dy. 5, a.

Tithes.

Impropriate tithes, issuing out of gavelkind lands, as they derive their origin from the dissolution of the monastries, an event within legal memory, are not, it is clear, within the custom. See *Doe* d. *Lushington* v. *Bp. of Llandaff*, 2 Bos. & Pul., N. R. 491; *Sands* v. *Drury*, 4 Gwill. 1569.

What lands subject to the custom of gavelkind.

The custom of gavelkind prevails with respect to socage lands over almost the whole of the county of Kent, and in a qualified manner over copyhold lands in various parts of the kingdom (*z*).

(*z*) In Mr. Robinson's Treatise on Gavelkind (pp. 42 & 49, 3rd ed.), the following places are mentioned, on various authorities, as subject to the customs of descent in gavelkind:—

The lands within the fee of *Pickering* in *Norfolk*.

The *Stoke of Rothelay* in *Leicestershire*.

The port of *Rye*, and many other places in *Sussex*. (1 Sid. 137.)

The manors of *Monmouth*, *Usk*, and *Trelleg*, and many other manors in *Monmouthshire*.

Evidence of Heirship.

Gavelkind.

Lands in Kent are presumed to be of gavelkind tenure; out of it the presumption is the other way: Rob. Gav. 3rd Ed., 54. Lands in Kent formerly held by knight service, in frankalmoign, or by any other than socage tenure, were not, and of course by the abolition of knight service during the Commonwealth, have not become, subject to the custom; nor

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Many places in *Shropshire*.
The territory of *Urchingfield*, in *Herefordshire*.
Kentish Town, near *Highgate*.
The manors of *Stepney* and *Hackney*, of *Canbury*, otherwise *Canonbury*, and *Newington Barrow* otherwise *Highbury*, both at *Islington*, in *Middlesex*.
The manors of *Askham*, *Lancham*, and *Sutton-cum-Lound*, in *Nottinghamshire*.
The fee of the *Marshal*, in *Norfolk*.
Saxham, near *Bury*, in *Suffolk*.

In Mr. Sawkins's note to the same work (3rd edit. p. 391), it is stated, that lands in the following manors are descendible after the custom of Borough-English:—
St. John of Jerusalem, Islington, Middlesex.
Sutton Court, Middlesex.
Surrey.—Weston Gumshall, in Albury; Colley, in Reigate; Sutton next Woking, in Woking; Little Bookham, in Little Bookham and Effingham; Wotton, Abinger, Paddington, Paddington Pembroke, respectively in the parishes of Wotton, Abinger, Ewhurst, and Cranley; Gumshall Towerhill, Gumshall Netley, Shere Vachery, and Cranley, and Shere Eborum, in the parishes of Shere Ewhurst, and Cranley; Dunsford, in the parish of Wandsworth; Compton Westbury; Brockham in Betchworth.
Boxted Hall, Essex.
A small part of the freehold and copyhold lands in Battel; Roberts-bridge, Sussex.
The copyhold lands in Somersham with the Soke, Alconbury Weston, Huntingdonshire.

In the following manors, the younger *brothers* (*ante*, p. 142,) inherit on failure of lineal heirs:—
Dorking, in Dorking and Capel; Milton and Wickott, in the parishes of Dorking, Capel, and Ockley, Surrey.

And, in the following manors in Middlesex, all collateral males are admitted.
Isleworth Syon; Ealing, otherwise Zealing; Acton.

And in the following, the youngest *female* relations, lineal and collateral, on failure of heirs male:—
Fulham, in Middlesex.
Wimbledon, including Putney, Mortlake, Roehampton, and Sheen; Battersea and Wandsworth; Downe; Barnes; Richmond, Surrey.
Southwell, Nottinghamshire.
Much Hadham, Hertfordshire.

Evidence of Heirship.

can anything short of an Act of Parliament alter the tenure of gavelkind lands: Ib.; see *Doe* v. *Lushington* v. *Bp. of Llandaff*, 2 Bos. & Pul., N. R. 49 (*a*).

Evidence of Heirship.—Where a person deduces his title as heir general at common law of his father, the evidence required is not only that he is the legitimate son, but the eldest or only son of his parent. Certificates of his parents' marriage, and of his baptism, it is obvious, prove only the former fact; and some evidence should be adduced in support of the negative allegation, that there was no elder son; particularly if, upon the comparison of the dates of the marriage and birth, it seems that the interval between them was such, as to render it probable that there was an elder child; that is, if it exceeded twice the ordinary period of gestation; though the fact that less than such a period intervened is not conclusive in favour of the heirship, as there might have been twins; or the eldest child might have been born, but not procreated, after the marriage. If the alleged heir be a daughter, the negative evidence of course should extend to the fact of her being the only child; as a son, whether elder or younger, would take precedence; and a daughter, whether older or younger, would be entitled to an equal share.

Defect arising from alienage.

Aliens.—Here may be noticed what formerly constituted a defect of title, which sometimes does not appear on the face of the abstract, namely, that one of the parties through whom the title is deduced is an alien. The attention of the conveyancer is only attracted to the point when the name or address is evidently foreign: and yet, it is obvious, any person whose name or description might fail to excite suspicion of his not being one of her Majesty's liege subjects, might turn out to be a foreigner; he might not have been an Englishman, either by nativity or parentage. This often occurs

(*a*) See further as to the custom of gavelkind the 3rd Report of the Real Property Commissioners at pp. 11 *et seq.*; see also Bro. Ab. *Custom*, 66; Fitzh. *Prescription*, 52.

in the case of illegitimate children, who, being *filii nullius*, are necessarily aliens, if born out of the British dominions (*b*). Evidence of Heirship.

Before the Naturalization Act, 1870, aliens could only purchase lands before denization, subject to the right of the Crown at any time to assert its prerogative to them. The claim of the Crown extended to leaseholds, except as regards habitations of alien merchants during their lives and residence within the realm (see 32 Hen. 8, c. 16, s. 13); and an alien could not protect himself by taking a conveyance in the name of a trustee. But now, by 33 Vict. c. 14, s. 2, Aliens.

> "Real and personal property of every description may be taken, acquired, held, and disposed of by an alien, in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject."

This enactment does not, however, affect dispositions made before the passing of the Act (12th May, 1870).

Naturalization (which could formerly only be by Act of Parliament) gives to an alien and his issue all the rights of a natural-born subject, except those of filling certain offices, and of taking grants from the Crown, &c. (12 & 13 Will. 3, c. 2; 1 Geo. 1, st. 2, c. 4, s. 2), a restriction which is sometimes removed in favour of eminent persons, by a temporary repeal of the statutes creating it, and enables the alien to inherit to any of his ancestors, and to transmit lands to his children, being natural-born subjects, though born before the Act of Naturalization: Co. Litt. 129, a. 8, a. By the stat. 33 Vict. c. 14, s. 7, an alien who has resided in the United Kingdom, or has been in the service Naturalization.

(*b*) It seems that an alien might always take chattels real as administrator or executor, because he has them *in autre droit* (*Caron's* or *Carvon's case*, Cr. Car. 9, pl. 6, cit. 1 Vent. 417; 2 Vin. Ab. 260, pl. 19): although he may not be guardian in socage: Per *Hale*, C. B., 1 Vent. 417.

As to the application of the English law respecting aliens, to the East Indies, and other conquered countries, see *The Mayor of Lyons* v. *East India Company*, E. F. Moore, 175. In the East Indies aliens may hold land. Ib.

Evidence of Heirship.

of the Crown for not less than five years, and intends, when naturalized, either to reside in the United Kingdom or to serve under the Crown, may apply to one of Her Majesty's principal Secretaries of State for a certificate of naturalization. An alien to whom a certificate is granted becomes entitled to all political and other rights, powers and privileges, and subject to all obligations of a natural-born British subject, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject, previously to his obtaining his certificate, be deemed to be a British subject, unless he has ceased to be a subject of that state, or in pursuance of a treaty. This Act is not retrospective (*Sharp* v. *St. Sauveur*, L. R., 7 Ch. 343) and takes effect from 12th May, 1870.

Denization.

Denization by grant from the Crown (*c*) has no retrospective operation, otherwise than by way of confirmation of any estate the alien may have already acquired: *Fourdrin* v. *Gowdry*, 3 Myl. & K. 383, *supra*. It does not give inheritable blood, or enable the denizen to take land at all by inheritance, except under the Inheritance Act, as heir to his children born after the denization: nor, therefore, at common law, could any descent be traced through him: *Collingwood* v. *Pace*, 1 Vent. 413, 419. And if a denizen purchase land, his son born after denization, it is said, by Lord *Coke*, shall inherit, and not an elder son born before, although a natural-born subject, rather than go to whom the land shall escheat; so that a denizen had in fact no heirs besides his own children born after denization, and their issue: Co. Litt. 8 a; Com. Dig. *Alien* (D. 2). See *Collingwood* v. *Pace*, 1 Vent. 413.

Roman Catholics.

By stats. 1 Will. & M., sess. 1, c. 26; 13 Ann. c. 13, s. 1, Roman Catholics and their trustees are disabled from presenting to any benefice; and the presentation to livings south of the Trent, vested in such persons, is given to the University of Oxford; that to livings north of the Trent to Cambridge; and

(*c*) The powers of the Crown in this particular are not affected by the Naturalization Act, 1870, but as aliens under that Act enjoy more extensive privileges than they could obtain by denization, such grants are likely to become obsolete.

Evidence of Heirship.

by 11 Geo. 2, c. 17, such persons are disabled from granting any advowson or right of presentation vested in them at law or in equity, to any other than a Protestant.

10 Geo. 4, c. 7, s. 23.

By the Roman Catholic Relief Act, 10 Geo. 4, c. 7, s. 23, it is enacted, that no oath or oaths shall thereafter be tendered to, or required to be taken by, his Majesty's subjects professing the Roman Catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as may by law be tendered to, and required to be taken by, his Majesty's other subjects (*d*).

Jews.]—Jews are not even disabled from holding advowsons and presenting to benefices. See 10 Geo. 1, c. 4. (Rep. Stat. Law Rev. Act, 1867.)

Attainder.

Attainder.]—Another interruption to which the course of descent was liable, arose from the attainder of a person through whom it might otherwise have been traced. The effect of attainder for treason or murder was forfeiture of the lands of the offender, and corruption of his blood; so that he neither could inherit, nor transmit by inheritance. But, as in the case of an alien, children born after attainder might at common law have inherited to each other. See *Collingwood* v. *Pace*, 1 Vent. 413; Co. Litt. 8 a. The stat. 33 & 34 Vict. c. 23, abolishes the forfeiture and escheat of lands and goods for treason and felony, but not in case of outlawry.

Heirship how made out.

Proof of seisin.

Evidence of Heirship.]—In establishing a descent, the first fact to be proved, under the present law, is that the person from whom the descent is traced was the purchaser. Where the descent took place before the year 1834, it was necessary to make out the seisin of the supposed ancestor, unless he was

(*d*) As to lands devoted to places of worship, schools, education, arts, science, recreation and other religious or charitable purposes, see 2 & 3 Will. 4, c. 115; 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49; 17 & 18 Vict. c. 112; 22 Vict. c. 27; 31 & 32 Vict. c. 44 (13 July 1868); 36 & 37 Vict. c. 50.

Evidence of Heirship.

himself the purchaser (*e*). Actual occupation by an heir may be proved by affidavit or statutory declaration, and possession by the ancestor's tenant will, in general, amount to a seisin in the heir, without any payment of rent (*e*). Receipts for rent given by the heir, or a lease or the counterpart of a lease, made by the heir himself, are evidence of his seisin. See *Davies* v. *Lowndes*, 7 Scott, at pp. 30, 32. Such, too, are declarations of a deceased occupier, as to the person of whom he held, which are admitted as declarations against the interest of the person making them, the possession of every occupier being *primâ facie* taken to be a seisin in fee, the identity of the lands being of course proved: *Peaceable* d. *Uncle* v. *Watson*, 4 Taunt. 16; see *Doe* d. *Human* v. *Pettet*, 5 B. & Al. 223; *Doe* d. *Baggalley* v. *Jones*, 1 Camp. 367. Assessments to the poor rates or land tax are received in practice as evidence to the same effect; and an entry in the collector's book, that a given party had paid the rate as occupier of certain premises, has been held to be evidence of occupation, being an admission against the party's interest: *Doe* d. *Smith* v. *Cartwright*, 1 Car. & P. 218; 1 Ry. & Mood. 62. See *Harrison* v. *Blades*, 3 Camp. 457. So, the books of an insurance company, in which they charge themselves with the receipt of premiums, for the insurance of particular premises in the occupation of A. B., are evidence of his occupation: *Doe* v. *Cartwright*, *ubi sup.* But where it was shown that the names of deceased proprietors were usually retained on the books until the estate was sold to a different family, the assessment to the land tax was rejected as evidence of the seisin of a particular person: *Doe* d. *Stansbury* v. *Arkwright*, 1 Nev. & M. 731. But, if the assessment can be explained by other evidence, it may be received: *Doe* d. *Strode* v. *Seaton*, 4 Nev. & M. 81. Assessments to the land tax have, since the year 1744, been filed with the clerk of the peace.

Death and intestacy of ancestor.

The death and intestacy of the ancestor are next to be proved. The regular evidence of death is the register; intestacy as to the estate in question is, in

(*e*) See the 3rd ed. of this work, vol. i. p. 124; Watkins, Des. 32, 39.

ordinary practice, considered to be sufficiently proved by the production of letters of administration, or of the probate of a will containing no devise of the estate. The same documents are generally received by conveyancers as sufficient evidence of death. They are not, of course, legal evidence of that fact: *Thompson* v. *Donaldson*, 3 Esp. 63; *French* v. *French*, Dick. 268. Evidence of Heirship.

In proving the relationship of the person proposed as heir, the practice of conveyancers is little more lax than the rules of law. As it would be impossible to establish descents according to the strict rules by which contracts are established and rights of property regulated, courts of law are obliged, in matters of pedigree, to depart from the ordinary rules of evidence, and to have recourse to a secondary kind of evidence—the best the nature of the subject will admit: 13 Ves. 143. Hence the admissibility of hearsay evidence in questions of this nature. But tradition generally is not evidence even of a pedigree. "The tradition must be from persons having such a connexion with the party to whom it relates, that it is natural and likely, from their domestic habits and connexions, that they are speaking the truth, and that they could not be mistaken. The whole goes upon that: declarations in the family—declarations in wills—declarations upon monuments—declarations in Bibles and registry books—all are admitted, upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth (*f*); but there may be many considerations forming part of the tradition, which you would reject, taking the body of the tradition:" *Per* Lord *Eldon*, C., *Whitelocke* v. *Baker*, 13 Ves. 514. See *Goodright* d. *Stephens* v. *Moss*, Cowp. 591; *Monkton* v. *Att.-Gen.*, 2 Russ. & M. 147. The opinion of the neighbourhood of what passed among ac- Hearsay evidence in matters of pedigree.

(*f*) Upon a question of general interest in a parish or other district, evidence of declarations of deceased inhabitants of the parish, &c., is admitted in proof of reputation, notwithstanding the interest the parties making the declaration had in the matter: *Moseley* v. *Davis*, 11 Price, 162; 1 Phill. Ev. 250.

Evidence of Heirship.

Hearsay evidence.

quaintance will not do: 13 Ves. 147. Upon this principle, inscriptions upon tombstones or mural monuments, which can be connected with the family, are admitted; as it must be supposed the relations of the family would not permit an inscription, without foundation, to remain (*Slaney* v. *Wade*, 1 Myl. & Cr. 356; *Monckton* v. *Att.-Gen.*, 2 Russ. & My. 163; *Davies* v. *Lowndes*, 7 Scott, N. R. 193): and it is not necessary that the inscription should be in a burying-ground belonging to the established church: *Whittuck* v. *Waters*, 4 Car. & P. 376. Inscriptions on foreign monuments have been received as evidence: *Perth Peerage case*, 2 H. L. C. 874. So, engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it: *Vowles* v. *Young*, 13 Ves. 144. So also family portraits, *Camoys Peerage case*, 6 Cl. & F. 801; hatchments, *Hangate* v. *Gascoigne*, 2 Coop. 412; coffin plates, *Chandos Peerage case*, Pr. Min. 10; *Lovat Peerage case*, Pr. Min. 77.

Whose declarations not admissible.

Declarations by a servant or physician, however long and intimate his acquaintance with the family, are not admissible as evidence or reputation, on account of the impossibility of laying down a rule as to the degree of intimacy which would be sufficient: *Johnson* v. *Lawson*, 9 Moore, 193; 2 Bing. 86; *Doe* d. *Sutton* v. *Ridgway*, 4 B. & Al. 53. See *Slaney* v. *Wade*, 1 My. & Cr. 338; *Crease* v. *Barrett*, 1 C., M. & R. 928.

Declarations against interest.

But declarations by such persons, with respect to individual occurrences within their own knowledge, and in which they have an interest, may, under certain circumstances, be admissible. Thus, an entry by a deceased surgeon in his day-book, of an attendance at a birth, with a reference to his ledger, where there was a memorandum of payment, was admitted in proof of the time of birth, being an admission against his interest: *Higham* v. *Ridgway*, 10 East, 109. So an entry in the books of the Merchant Taylors' Company, that T. C. was admitted a freeman, as the son of J. C., deceased, is admissible to prove the relationship: *Collins* v. *Maule*, 8 C. & P. 502. See *Standen* v. *Standen*, 1 Peake, 34; *Barker* v. *Ray*, 2 Russ. 76; *Gleadow* v. *Atkin*, 1 Cr. & M. 428.

Evidence of Heirship.

Declarations of a husband respecting his wife's family are admitted for the same reason as declarations of relations: *Vowles* v. *Young*, 13 Ves. 147; *Doe* d. *Northay* v. *Harvey*, Ry. & Mood. 297; *Doe* d. *Futter* v. *Randall*, 2 Moo. & P. 20. So also the declaration of a wife as to the state of her husband's family (*Shrewsbury Peerage case*, 7 H. L. C. 1); but the relationship of the declarant must first be proved *aliunde*. When declarations by relations cannot be obtained, conveyancers often accept the declarations of other persons well acquainted with the family, although such statements are not receivable in court as evidence, unless against interest: Dart, V. & P. 348. See also *Sussex Peerage case*, 11 Cl. & F. 85, 112; *Lloyd* v. *Wait*, 1 Ph. 61. It seems that, except as between parent and child, the declarations of persons of illegitimate birth are not receivable as coming from relations: *Doe* d. *Bamford* v. *Barton*, 2 M. & Rob. 28.

Hearsay evidence.

Declarations of husband.

Declarations made after questions have arisen in the family respecting the matters which they are offered to prove, or in contemplation of disputes, especially by persons interested in the result, are not admissible: *Edwards* v. *Harvey*, G. Cooper, 39; *Berkeley Peerage*, 4 Camp. 404. See Id. pp. 407, 418; *Slane Peerage*, 5 Cl. & F. 23. But, from the nature of the rule itself, declarations made *ante litem motam*, by a relation, tending to show his title as remainderman, are admissible: *Doe* d. *Filman* v. *Tarver*, Ry. & M. 141; *Monkton* v. *Att.-Gen.*, 2 Russ. & My. 159. The *lis mota*, or commencement of the controversy, is the time when the state of facts arose on which the claim is founded: *Walker* v. *Beauchamp*, 6 Car. & P. 552; see 1 My. & Cr. 356; *Slane Peerage*, 5 Cl. & F. 23; 7 Sim. 616.

Declaration *post litem motam.*

The records and books of the Herald's College are admissible as evidence. See *Shrewsbury Peerage case*, 7 H. L. Ca. 1. So are entries in family bibles, or in testaments, admissible as evidence without proof of their handwriting or authorship: *Monkton* v. *Att.-Gen.*, *ubi supra*; *Hubbard* v. *Lees*, L. R., 1 Ex. 255: and entries in prayer books, missals, and other books, whether religious or not, or any document or

Entries in family bibles, &c.

Evidence of Heirship.

paper, if produced from the proper custody: and an entry by the mother of a claimant in a prayer book, stating the fact of her marriage, has been admitted: *Sussex Peerage case*, 11 Cl. & F. 85. Pedigrees, &c. are admissible, as being declarations made by relations. It is immaterial (so far as the admissibility of the evidence is concerned), in what book or on what piece of paper the entry is made, so that it be shown to have proceeded from a member of the family: *Herbert* v. *Tucket*, T. Raym. 84; 4 Camp. 418; see p. 421; *Monkton* v. *Att.-Gen.*, 2 Russ. & M. 162; *Hood* v. *Beauchamp*, 8 Sim. 26; *Slane Peerage*, 5 Cl. & F. 23; *Fitzwalter Peerage case*, 10 Cl. & F. 193. Recitals in settlements, to which relations were parties, or wills (*f*), owe their weight (as against strangers to the deed) entirely to the same rule: *Neale* v. *Wilday*, 2 Str. 1151; Bull. N. P. 233; *Doe* v. *E. of Pembroke*, 11 East, 504; 2 Peake, 204; *Vaux Peerage*, 5 Cl. & F. 526; *Welcome* v. *Upton*, 6 M. & W. 536; see *Fort* v. *Clarke*, 1 Russ. 604. Therefore they are not admissible to prove the pedigree of a person not related to any of the parties to the deed: *Slaney* v. *Wade*, 1 Myl. & Cr. 338. In the case of a pedigree chart hung up in a family mansion, the mere fact of its remaining is proof of its adoption by the family, without its being shown to have been framed by any member of it: *Monckton* v. *Att.-Gen.*, 2 Russ. & M. 163; see 5 Cl. & F. 539; *Davies* v. *Lowndes*, 7 Scott, N. R. 193. By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), sect. 2, recitals, &c., contained in deeds and instruments twenty years old, are made evidence of the truth of facts therein stated: *vide ante*, p. 130.

Secondary hearsay evidence.

It is not necessary that the hearsay should be in the first degree; that is, that the declarations offered should have related exclusively to matters within the personal knowledge of the party making, or even to matters which happened in his own time;

(*f*) If the question relates to a real estate, the fact of the statement in a will cannot be proved by the probate; but the ledger book of the Spiritual Court, or an authenticated copy of it, would be admissible: Bull. N. P. 246.

Evidence of Heirship.

Hearsay evidence.

and therefore, a person's declaration, that his grandmother's maiden name was A. B. is admissible, although he could not possibly have any contemporary knowledge of the fact: 2 Russ. & M. 158; *Zouch* v. *Waters*, 12 Vin. Ab. 244, pl. 5. See 1 My. & Cr. 355.

Secondary evidence of family writings, inscriptions, &c.

Even secondary evidence of the contents of lost writings, which would have been received as declarations of relatives, has been admitted. Thus, where it was shown, that, prior to the year 1810, when a certain church was repaired, there was an inscription, in what was called the *Manton* chancel, where some of the *Manton* family was buried, the evidence of a person who had made a pencil copy of the inscription, by the direction of the clergyman, when the church was being repaired, was held to be admissible in proof of the contents of the inscription; and it was also held, that the witness might refresh his memory by looking at the copy he had made, although the pencil marks had been inked over by the clergyman, in his anxiety to preserve it: *Slaney* v. *Wade*, 1 My. & Cr. 338. See *The Vaux Peerage*, 5 Cl. & F. 541. On the same principle, though a parish register affords no evidence of the time or place of birth, yet, if a statement contained in it as to those facts be shown to have been made on the authority of a relation, it may be admissible. See *Rex* v. *North Petherton*, 8 Dowl. & Ry. 325; 5 B. & C. 508; *Rex* v. *Clapham*, 4 Car. & P. 29; *Morris* v. *Davies*, 3 Car. & P. 215, 427; *Lloyd* v. *Passingham*, 16 Ves. 59; G. Coop. 152.

A pedigree, purporting to have been compiled from monumental inscriptions, family records, and *history*, was rejected: *Davies* v. *Lowndes*, 7 Scott, 22.

Implications from conduct.

Declarations respecting pedigree may be *presumed* from the conduct of relations; or, in other words, their conduct may be equivalent to a declaration. Thus, "if the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy, till impeached; and, indeed, it amounts to a daily assertion, that the son is legitimate." Per Lord *Mansfield* in the *Berkeley Peerage case*, 4 Camp. 416. And, on the contrary, the con-

Evidence of Heirship.

Hearsay evidence.

cealment by a wife from her husband of the birth of a child (*Hargrave* v. *Hargrave*, 2 C. & Kir. 701), and the use by a person and his descendants of a different name from that of his reputed father, have been considered to be evidence of illegitimacy: *Goodright* d. *Tompson* v. *Saul*, 4 T. R. 356; *Townshend Peerage case*, 10 Cl. & F. 289; *Atchley* v. *Sprigg*, 33 L. J., Ch. 345.

The production of a will in which the testator takes no notice of his family, but devises and bequeaths his property to strangers, is strong evidence of his having died childless: *Hungate* v. *Gascoigne*, 2 Phill. 25; *De Ros Peerage case*, 2 Coop. 540.

Declarations admissible in proof of *age*.

It was at one time doubted whether hearsay evidence of the kind we have been considering, was admissible to prove the *age*, as well as the relationship, of a person; but it is clear that the *time* of a birth, a marriage, or a death, is matter of pedigree, and therefore within the rule. "Declarations of the nature of pedigree, that is to say, of who was related to whom—by what links the relationship was made out—whether it was a relationship of consanguinity, or of affinity only—*when* the parties died, or whether they are actually dead—everything in short which is, strictly speaking, matter of pedigree, may be proved as matters relating to the condition of the family, by the declarations of deceased persons, who, by evidence dehors those declarations, have been previously connected with the family respecting which their declarations are tendered." Per Lord *Brougham*, C., 2 Russ. & M. 156. In *Rider* v. *Malbone*, cit. 2 Russ. & M. 169, and *Herbert* v. *Tucknal*, T. Raym. 84, hearsay evidence as to dates was admitted; and see also *Goodright* d. *Stevens* v. *Moss*, Cowp. 503; *Kidney* v. *Cockburn*, 2 Russ. & M. 167; Vin. Ab. Evid., T. 6, 91. So, to prove that an eldest son was born before marriage, declarations by himself that he was a bastard were admitted: *Cooke* v. *Lloyd*, Peak Ev., App. 78. And a statement in a will of the date of a relation's birth was admitted: *Williams* v. *Huskisson*, 3 Y. & C. 80. But the *place* of birth is not matter of pedigree: *Rex* v. *Erith*, 8 East, 539.

What are matters of pedigree.

Evidence of Heirship.

Presumption of death without issue.

It may be added that, in cases of pedigree, persons presumed to be dead, are presumed to have died unmarried, and without issue: *Doe* d. *Oldnall* v. *Deakin*, 2 Man. & Ry. 195; *S. C. nom. Doe* d. *Oldham* v. *Wolley*, 8 B. & C. 22.

Legitimacy.

The legitimacy of a person is, for most purposes, determined by the law of the domicil of his parents, and a person born in England, of parents domiciled there, under circumstances which make him illegitimate there, although he would be legitimate in Scotland, is not to be considered as legitimate, even in Scotland, for the purpose of inheriting land there, nor for any other purpose: *Munro* v. *Ross* (or *Sanders*), 6 Bligh, 468, and cases there cited. But a person born before wedlock in Scotland, of parents domiciled there, who subsequently married there(*g*), was held incapable of inheriting land in England, the legitimacy being determined with reference to the law of the country which governs the devolution of real property: *Doe* d. *Birthwhistle* v. *Vardill*, 8 Dowl. & Ry. 185; 5 B. & Cr. 438; affirmed D. P. August, 1840; 1 Scott, N. R. 800; but see the admirable opinion of Lord *Brougham*, 9 Bligh, 32. The decision is certainly anomalous. See *Munro* v. *Ross*; *Brodie* v. *Barry*, 2 Ves. & B. 127. As to proof of legitimacy of children born in wedlock, see *Shelley* v. ——, 13 Ves. 58; *Head* v. *Head*, 1 Sim. & St. 150; Turn. & R. 138; *Banbury & Gardner Peerage case*, 1 Sim. & St. 153; *Gibbs* v. *Hooper*, 2 My. & K. 353; *Bury* v. *Philpot*, Id. 549; *Rex* v. *Luffe*, 8 East, 193; *Goodright* d. *Tompson* v. *Saul*, 4 T. R. 356; *Morris* v. *Davies*, 5 Cl. & F. 163; *Cope* v. *Cope*, 5 Car. & P. 604; Sir H. Nicholas on Adulterine Bastardy.

(*g*) If either of the parents marry with a third person, after the birth of their child, and before marriage with each other, the initial illegitimacy of such child is incurable according to the law of Scotland: 5 B. & Cr. 438. The law of legitimation by subsequent marriage is not admitted in Ireland, nor in most of the British possessions abroad, nor in the northern states of America; but prevails, with various modifications, in most of the continental states of Europe, and in the Isle of Man, Jersey, Guernsey, St. Lucia, Trinidad, Ceylon, and the Mauritius; at the Cape of Good Hope; in the southern states of America, Lower Canada, Demerara, and Berbice.

Evidence of Heirship.

Legitimacy.

As to what doubts in respect of legitimacy are fatal to a title, see *Lord Braybroke* v. *Inskip*, 8 Ves. 417; and see *Smith* v. *Death*, 5 Mad. 371; 6 Id. 57.

A husband has a sufficiently strong interest in his wife's legitimacy to make evidence of his declaration upon the subject admissible towards proof of the fact: *Vowles* v. *Young*, 13 Ves. 140. Declarations of the parents themselves after the birth are, for an obvious reason, of little weight: *Sherborne* v. *Napier*, 2 Ridg. P. C. 234. The fact of illegitimacy is often mentioned in the registry of baptism; but such records are not entitled to much weight. See *May* v. *May*, 2 Str. 1073; Peake, Ev. 86. See further, as to proof of legitimacy, *Slaney* v. *Wade*, 1 Myl. & Cr. 338; *Fox* v. *Bearblock*, 17 Ch. D. 429.

Parish registers.

Parish registers prove only the time and place of baptism, marriage, and burial; statements contained in them as to the time or place of birth or the time of death, are not evidence of those facts: *Withen* v. *Law*, 3 Stark. 63; *Rex* v. *North Petherton*, 8 D. & Ry. 325; 5 B. & C. 508; *Burghart* v. *Angerstein*, 5 Car. & P. 690. The contents of a parish register may be proved by a verified extract: *Anon.* Lofft, 328; *Birt* v. *Barlow*, 1 Doug. 174. See *Walker* v. *Wingfield*, 18 Ves. 443; *Walker* v. *Lady Beauchamp*, 6 Car. & P. 552.

Private registers.

Private registers, such as the registers of dissenters, of every kind, registers in an ambassador's chapel at home, or in a chapel abroad, the Fleet books, and Guernsey registers, are not admissible: *Ex parte Taylor*, 1 Jac. & W. 483; *Whittuck* v. *Waters*, 4 Car. & P. 375; *Leader* v. *Barry*, 1 Esp. 353; *Read* v. *Passer*, Id. 213; *Lloyd* v. *Passingham*, 16 Ves. 59; *Doe* d. *Passingham* v. *Lloyd*, 1 Esp. 215; Peake, 231; *Doe* d. *Davies* v. *Gatacre*, 8 Car. & P. 578; *Huet* v. *Le Mesurier*, 1 Cox, 275. See *Lawrance* v. *Dixon*, Peake, 136.

By the stat. 3 & 4 Vict. c. 92, s. 6, all registers and records deposited in the General Register Office by virtue of that Act (except the registers and records of baptisms and marriages at the Fleet and King's Bench prisons, at May Fair, at the Mint in Southwark, and elsewhere), are to be deemed to be in

legal custody, and to be receivable in evidence in all courts of justice, subject to the provisions therein contained; and, by sects. 11 and 13, certified extracts of such registers are made evidence in the courts of law and equity. Evidence of Heirship.

The stat. 6 & 7 Will. 4, c. 86 (amended by the 1 Vict. c. 22), provides for the registering of births, marriages, and deaths in England. Indexes are kept at the offices of the superintendent registrars, and also at the registrar-general's office; and by sect. 38, it is enacted, that all certified copies of entries, purporting to be sealed or stamped with the seal of the General Register Office, shall be used as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry and certified copy, purporting to be given in the said office, shall be of any force or effect, unless so sealed or stamped. The registry of birth, under the above Act, is evidence of the fact of the birth, but not of the exact date: *In re Wintle*, L. R., 9 Eq. 373. Registry of births, &c.

The registers of baptisms, marriages, and burials in India are deposited at the office of the Secretary of State for India; and the registers of births, baptisms, marriages, and burials of British subjects beyond seas, which have been transmitted from various British embassies, &c., are now placed in the registry of the Consistory Court of London: Taylor, Ev. 1251.

Copies of colonial and foreign registers are admissible only on proof that they are required to be kept either by the law of the colony, or foreign country (as the case may be), or by the law of this country: *Perth Peerage case*, 2 H. L. C. 865; *Abbott* v. *Abbott*, 29 L. J., Pr. & M. 57.

The registry must, of course, in all cases, be connected with the party by evidence of identity. See *Best* v. *Barlow*, Doug. 170; 12 Vin. Ab. Evid., A. b. 15, pl. 11; T. b. 69, pl. 3; *Draycott* v. *Talbot*, 2 Br. P. C. 92. Handwriting may, it seems, be resorted to for the purpose. See *Mortimer* v. *M'Calln*, Exch. H. T. 1840; 4 Jur. 172.

The fact of a marriage may be proved by the evidence of parties present, and even by the presumptive evidence of general reputation, without having re- Evidence of marriage.

Evidence of Heirship.

course to the register: *Allison's case*, 1 R. & R. 109; *Morris* v. *Miller*, 1 Blackst. 632; *Evans* v. *Morgan*, 2 Cr. & J. 453; see Doug. 172; *Gordon* v. *Gordon*, 3 Swanst. 400. The chief danger attending presumptive evidence of marriage is, that such evidence may be rebutted by either of the parties: *Goodright* d. *Stephens* v. *Moss*, Cowp. 531; *Rex* v. *Bramley*, 6 T. R. 330. After the deaths of both parties, such evidence may be safely relied on. The execution of marriage articles, followed by cohabitation, was admitted as raising a presumption of marriage: *Roscommon Earldom case*, cited in Hub. on Ev. p. 257. So, too, in the *Saye and Sele Barony case* (ib. p. 247), the fact that the cohabiting parties visited families of respectability. A marriage has been presumed from the husband's impaling the wife's arms with his own on his plate, &c. (*Hervey* v. *Hervey*, 2 W. Bl. 899); from letters between the parties, (Ib.); from their children being described, in parish registers, as their legitimate offspring (Ib.; *Lord Braybroke* v. *Inskip*, 8 Ves. 417); from fines, levied for the purpose of barring the wife's dower (*Hervey* v. *Hervey*; *Cook* v. *Lloyd*, Peake, Ev. xxviii. (5th ed.)); from the elopement of the parties, and their return as man and wife: Ib. In the *Sussex Peerage case* an entry by the mother of the claimant in a book was accepted as evidence of her marriage: 11 Cl. & F. 85. As to what evidence of this kind should satisfy a purchaser, see *Lord Braybroke* v. *Inskip*, 8 Ves. 417.

PROOF OF WRITINGS (*h*).

Acts of Parliament.

Proof of Written Documents—Acts of Parliament.]—The original Acts of Parliament are kept at the Parliament Office, both public and private; the

(*h*) With regard to requiring proofs of writings, it must be borne in mind, that by sect. 3 (6) of the Conveyancing, &c. Act, 1881, it is enacted that, under an open contract, "On a sale of any property *the expenses of the production and inspection* of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, *not in the vendor's possession*, and the expenses of *all journeys* incidental to such production or inspec-

latter being filed and labelled for reference. The public Acts are enrolled, and the rolls are kept at the Record Office; but it has not for a long time been the practice to enrol private Acts. (See the Introduction to the Statutes, published by the Record Commissioners, p. xxxv.) All public Acts are presumed to be known to the judges, who refer to the printed copies only for the purpose of refreshing their memories. But a greater weight is, by implication, given to these copies by the stat. 41 Geo. 3, c. 90, s. 9, which enacts, that the copy of the statutes of the kingdom of England and of Great Britain, since the Union, printed and published by the printer duly authorized to print and publish the same, shall be received as conclusive evidence of those statutes, in any Court in Ireland; and in like manner the printed statutes of Ireland, prior to the Union, are made evidence in courts in Great Britain. Proof of Writings.

Private Acts of Parliament are proved by a copy, examined with the original. But such an Act, containing the clause usually inserted, declaring that the Act shall be deemed and taken to be a public Act, and shall be taken notice of as such by all judges, &c., is sufficiently proved by a copy, and is printed by the Queen's printers: *Beaumont* v. *Mountain*, 4 Moo. & Sc. 177. And now all copies of such Acts, if purporting to be printed by the Queen's printers, are to be admitted as evidence thereof, without any proof that such copies were so printed: 8 & 9 Vict. c. 113, s. 3. The clause Private Acts.

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tion, and the expenses of searching for, procuring, making, verifying and producing all certificates, declarations, evidences, and information *not in the vendor's possession*, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, *not in the vendor's possession*, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract or for any other purpose, *shall be borne by the purchaser* who requires the same; and *where the vendor retains possession of any document* the expenses of making any *copy* thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser."

Proof of Writings.

formerly used in private Acts, declaring a copy printed by the King's printer to be evidence, rendered unnecessary any proof that the copy was actually so printed: Phill. Evid. 611. Clauses in a private Act, which are of public concern (as clauses relating to highways, &c.), are judicially noticed in the same manner as clauses in a public Act: *Rex* v. *Utterby*, Phill. Evid. 610.

Error in printed copy.

Where there is any discrepancy between the printed copy and the parliament roll, the latter is preferred: 1 Str. 446. The divisions into sections in the printed copy, made for convenience of reference, are not to be regarded in the construction: 3 B. & Cr. 71. After some difference of opinion among the judges, it has been finally decided by the Court of Appeal, in the recent case of *Sutton* v. *Sutton*, 22 Ch. D. 511, that the marginal notes to the several sections are not to be taken as forming part of the Act.

Matters of record.

Other Matters of Record.]—A record is proved in court by a copy under seal, which is either an exemplification or an *inspeximus* (see Vin. Ab. Ev., A. b. 25, 33, 44), or by an examined or an office copy; which latter, in any other cause or court than that to which the record belongs, must be proved to have been examined with the original. See *Slane Peerage*, 5 Cl. & F. 23. But office copies made by an officer in pursuance of a duty imposed on him by the law, as chirographs of fines, &c., are evidence, without more; but where the duty of the officer is merely to enrol and permit inspection, his copy of the document is not admissible any more than another copy, unless proved to have been examined: Phill. Ev. 615. An ancient document, produced from the proper custody, and importing to be an exemplification, but which then had not the great seal affixed, was presumed to be an exemplification, and admitted in evidence: *Mayor, &c. of Beverley* v. *Craven*, 2 M. & Rob. 140.

Where the document itself is not enrolled, the conveyancer of course requires it to be produced; and the certificate on it by the proper officer is suffi-

cient proof of the fact of enrolment (*Kinnersley* v. *Orpe*, Doug. 56); and of the date if that is stated: *Garrick* v. *Williams*, 3 Taunt. 540; *Rex* v. *Hopper*, 3 Price, 495. And the person, whose name appears on the certificate, is presumed to be the proper officer: *Doe* d. *Williams* v. *Lloyd*, 1 Scott, N. R. 503. Proof of Writings.

And as the original is the proper evidence, and the deposit of it will amount to an equitable mortgage, a purchaser will not be satisfied with an examined copy of a bargain and sale (although by the 10 Anne, c. 28, s. 3, such copy is made evidence), unless the absence of the original is accounted for. An examined copy of any deed required by law to be enrolled, appears to be good evidence of the contents of that deed, independently of the provisions of the 10 Anne, c. 28; but where the enrolment is not required by law such copy is only evidence against the party upon whose acknowledgment the enrolment was made: Bull. N. P. 256; 3 Camp. 20. The statute 8 Geo. 2, c. 6, s. 22, establishing a registry of deeds in the North Riding of Yorkshire, makes attested copies of the enrolments of deeds, &c., enrolled at length, evidence in case of the destruction of the originals. Bargain and sale.

Enrolment cannot be presumed, unless a chasm appears in the rolls, at the period when the enrolment should have taken place: *Doe* d. *Howson* v. *Wateton*, 3 B. & Al. 149; *Wright* v. *Smithies*, 10 East, 409. See 1 Jac. & W. 619; *Doe* d. *Griffin* v. *Mason*, 3 Camp. 7; *Doe* v. *Warwick Canal Co.*, 2 Scott, 717. The vendor must furnish attested copies of instruments on record. Enrolment.

By sect. 6 of the stat. 28 & 29 Vict. c. 63, being an act to remove doubts as to the validity of colonial laws, it is enacted that: Colonial laws. Stat. 28 & 29 Vict. c. 63.

Sect. 6. "The certificate of the clerk or other proper officer of a legislative body in any colony to the effect that the document to which it is attached is a true copy of any colonial law assented to by the governor of such colony, or of any bill reserved for the signification of her Majesty's pleasure by the said governor, shall be *primâ facie* evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such Certified copies of laws assented to or bills reserved to be *primâ facie* evidence that they are properly passed.

Proof of Writings.

law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by the authority of the governor in any newspaper in the colony to which such law or bill shall relate, and signifying her Majesty's disallowance of any such colonial law, or her Majesty's assent to any such reserved bill as aforesaid, shall be *primâ facie* evidence of such disallowance or assent."

Foreign law and custom.

Foreign laws and customs are not judicially recognised, except where a case is remitted to the superior courts of a foreign state for the purpose of ascertaining the law of such state as to the facts in question, under stat. 24 & 25 Vict. c. 11. Otherwise all foreign laws, usages and customs must be proved as facts in each particular case: *M'Cormick* v. *Garnett*, 5 De G., M. & G. 278. It is not sufficient to produce a copy of the code or law, but the assistance of competent persons who can describe and interpret the effect of the law is necessary: *Sussex Peerage case*, 11 Cl. & F. at p. 114; *Lord Nelson* v. *Lord Bridport*, 8 Beav. 527. Thus, in a case which depended upon the state of the marriage law of Scotland, depositions of eminent Scotch lawyers were admitted and considered by the Court: *Dalrymple* v. *Dalrymple*, 2 Hag. Con. 54. The competency of the persons whose evidence is sought to be given on a question of foreign law is a matter for the decision of the Court: *Bristow* v. *Sequeville*, 5 Exch. Rep. 275. They should hold in the country, whose laws are in question, some professional or official position from which sufficient knowledge will be presumed, *e. g.*, as judges, advocates, solicitors, officers attached to courts, etc. A Roman Catholic bishop, holding the office of coadjutor to a vicar apostolic, has been admitted to give evidence as to the matrimonial law of Rome: *Sussex Peerage case*, 11 Cl. & F. at p. 114. A French consular agent was admitted as a person officially skilled for the purpose of proving the law of France: *Lacon* v. *Higgins*, 3 Stark. 178. A foreign *custom* may, however, be proved by any person who can be shown to have knowledge thereof: *Mostyn* v. *Fabrigas*, 1 Cowp.

174; *Van der Donckt* v. *Thellusson*, 8 C. B. 812; and see Taylor, Ev. 1197. Proof of Writings.

By the Act to afford Facilities for the better Ascertainment of the Law of Foreign Countries, 1861, superior courts within her Majesty's dominions are empowered to remit cases with queries to the courts of any foreign state with which her Majesty may have made a convention for that purpose, for ascertaining the law of such state as to the facts in question. Stat. 24 & 25 Vict. c. 11.

The principles of construction with regard to foreign documents were fully considered in the case of *Di Sora* v. *Phillipps*; and it was held that, in order to ascertain the meaning, the court should be furnished with (1) a translation of the documents; (2) an explanation of any terms of art used in it; (3) information on any special law; and (4) on any peculiar rule of construction of the foreign state affecting it: 2 N. R. 553; 10 H. L. C. 624. See also *The Stearine, &c. Co.* v. *Heintzmann*, 17 C. B., N. S. 60. Construction of foreign document.

By sect. 7 of the Act to amend the Law of Evidence, 1851 (Lord Brougham's Act), it is enacted that— 14 & 15 Vict. c. 99.

"All proclamations, treaties and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice, in any foreign state or in any British colony, and all affidavits, pleadings and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or any affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign and colonial court to which the original document belongs, or, in the event of such Foreign and colonial acts of state, judgments, &c., provable by certified copies without proof of seal or signature, &c.

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court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

And by the statute 18 & 19 Vict. c. 42, s. 3—

Documents to be admitted in evidence without proof of the seal or signature or official character of the ambassador or other official person.

"Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any British ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, consul general, consul, vice-consul, acting consul, pro-consul, or consular agent, in testimony of any oath, affidavit, affirmation, or (*notarial*) act having been administered, sworn, affirmed, had, or done by or before him, shall be admitted in evidence without proof of any such seal or signature being the seal and signature of the person whose seal and signature the same purports to be, or of the official character of such person."

Fines and recoveries.

Fines and Recoveries.]—Recoveries are proved like other records. A fine is proved by the chirograph (2 Stark. N. P. 13); or by an exemplification, or a copy examined with the record. The authority of the chirographer does not extend to make proclamations; and these, therefore, in strictness, should be proved by comparison with the roll: 3 Taunt. 166; 6 Id. 486.

As to proceedings in bankruptcy, *vide ante*, p. 126.

Administration.

Administration.]—Under the old law the title of an executor or administrator might have been proved by the production of the probate or letters of administration, or by an exemplification or certificate thereof, or by an examined copy of the act-book of

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the spiritual court in which the original minutes of the court are contained: *Davis* v. *Williams*, 13 East, 232. See *Elden* v. *Keddel*, 8 East, 187. The Probate Division of the High Court of Justice has now, by the combined operation of the statutes 20 & 21 Vict. c. 77, 21 & 22 Vict. c. 95, and 36 & 37 Vict. c. 66 (Judicature Act, 1873), sect. 34, jurisdiction over all testamentary matters. These statutes, and the rules and orders made thereunder, do not make any definite regulations with regard to evidence; but it may doubtless be assumed that, on the analogy of the old practice, the title of an executor or administrator may be proved by production of the probate or letters of administration or by an exemplification thereof granted by a registrar or district registrar of the Probate Division: Taylor, Ev. 383.

Courts in which administration should be taken out and wills proved.

Administration must be taken out and wills proved in the court in whose jurisdiction the assets are situate. The locality of specialty debts is determined by that of the record or deed evidencing them; that of simple contract debts, by that of the debtor: 1 Salk. 40; 3 Id. 164; Carth. 149; 2 Selw. N. P. 764. The Probate Division has now jurisdiction over assets in all parts of England (*h*). French *rentes* and American stock are not within the jurisdiction of the English Courts: *Att.-Gen.* v. *Dimond*, 1 Cr. & J. 356; *Att.-Gen.* v. *Hope*, 1 Cr., M. & R. 530; 8 Bligh, 44. But Russian, Danish, Dutch, and other foreign bonds and securities that pass by delivery, are *bona notabilia* in the place where they are situate. See *Att.-Gen.* v. *Bouwens*, 4 Mee. & W. 171.

The executor of an executor *ad infinitum* represents the first testator.

The interest vested in an executor by the will of the deceased may be continued and kept alive by the wills of the successive executors: so that the executor of A.'s executor, in however remote a series, is, to all intents and purposes, the executor and representative of A. himself, and has the same interest in the goods and chattels of A., as the first and immediate executor: *Hudson* v. *Hudson*, 1 Atk. 461; 2

(*h*) See 20 & 21 Vict. c. 77, s. 23, and Judicature Act, 1873, s. 34.

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Bla. Com. 506; Toll. Ex. 242; 3 Bac. Abr. 19, *Executors* (B), 2. l. pl. 2; Williams, Exs. 8th ed. 258. But this is to be understood, when the executor proves the will (Ib. 259; Com. Dig. *Administration* (G)); for, if the first or any other executor die after administering, and before probate, his executor cannot prove the will of the testator; because he is not named executor to him in the will; no person being competent to prove a will but he who is named executor in the will (*Wankford* v. *Wankford*, 1 Salk. at p. 306); and administration of the goods of the testator must be granted *cum testamento annexo* to the executor of the executor, if the residue of the goods of the testator were bequeathed by his will to the executor; or otherwise to the residuary legatee, if any; or to the next of kin of the testator: 1 Roll. Abr. 907, pl. 10; *Isted* v. *Stanley*, Dyer, 372 a, (8); *Day* v. *Chatfield*, 1 Vern.. 200; 11 Vin. Abr. 67, pl. 10, 20, 27; Williams on Executors, 468.

But an executor of an executor cannot prove the will of the first testator.

Administration with the will annexed.

Devolution of executorship.

The reason that the second executor represents the original testator is said to be, that the court which grants him probate has jurisdiction over the original will: *Per* Sir *L. Shadwell*, 7 Sim. 103. So where the original will was proved in India, and the executor's will in England, the second executor was held not to represent the first testator: *Twyford* v. *Traill*, 7 Sim. 92. An executrix *coverte* may make a will, for the purpose of continuing the representation: *Scammell* v. *Wilkinson*, 2 East, 552; *Barr* v. *Carter*, 2 Cox, 429; *Willock* v. *Noble*, L. R., 7 H. L. 580, 589. It has been said that executor of an executor may refuse the executorship of the first testator, while he accepts the office immediately conferred on him; but he cannot accept the executorship of the original testator, and decline that of the mesne executor: 3 Bac. Ab. 42. But the settled practice of the prerogative court was to the contrary, and, in *Brooke* v. *Haynes*, L. R., 6 Eq. 25, it was expressly decided that an executor cannot renounce the executorship of other persons of whom his testator may have been the executor. And see Williams on Exs. 280.

Executrix *coverte*.

But the executor of A.'s administrator, or the administrator of A.'s executor, is not the represen-

Executor of administrator, &c.

tative of A. (Williams on Executors, 258; *Tingrey* v. *Brown*, 1 Bos. & P. 310; *Catherwood* v. *Chabaud*, 2 Dowl. & R. 271; 1 B. & Cr. 150); because the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; but the administrator of A. is merely the officer or deputy of the court, prescribed to him by Act of Parliament (31 Edw. 3, stat. 1, c. 11), in whom the deceased has reposed no trust at all: and, therefore, on the death of that officer or deputy, it results back to the court to appoint another. And, with regard to the administrator of A.'s executor, he has clearly no privity or relation to A.; being only commissioned to administer the effects of the intestate executor, and not of the original testator, therefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator *de bonis non* is the only legal representative of the deceased in matters of personal property, including chattels real: *Ley* v. *Anderton*, Styl. 225; *Tingrey* v. *Brown*, 1 Bos. & P. 310. But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, viz., of certain specific effects, the rest being committed to others: Williams on Executors, 486. See also 1 Roll. Abr. 908 (D), pl. 1; *Fawtry* v. *Fawtry*, 1 Salk. 36, pl. 2; 2 Bla. Com. 506.

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Limited administration.

Wills.]—The proper evidence of a will bequeathing chattels real and other personal property is the probate, bearing the seal of the Ecclesiastical Courts, if before 1857, or, since, then of the Principal Registry, or of a District Registry of the Court of Probate, until the reconstruction of the courts in 1875, and now of the Probate Division of her Majesty's High Court of Justice: *Pinney* v. *Pinney*, 2 Man. & Ry. 436; 8 B. & Cr. 335; *Allen* v. *Dundas*, 3 T. R. 125. Where the probate is lost,

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the proper evidence is an exemplification from the Registry by which it was granted (Bull. N. P. 246; 1 Str. 412); but an office copy of the probate is sufficient evidence of a will: Taylor, Ev. 1325. The probate act-book of an Ecclesiastical Court may be resorted to for the purpose of proving an executor's title, without accounting for the non-production of the probate: *Cox* v. *Allingham*, Jac. 514; *Doe* d. *Edwards* v. *Gunning*, 2 Nev. & P. 260; 7 A. & E. 244; Taylor, Ev. 383, 384. And an official extract from such book is made evidence by 14 & 15 Vict. c. 99, s. 14. Revocation of a probate may be proved by the assignation book, at the Prerogative Court: *Rex* v. *Ramsbottom*, 1 Leach, Cr. C. 25, n.

The probate of a will was formerly considered not admissible at all to prove any part of its contents that relate to real property, either of freehold or copyhold tenure,—not even as secondary evidence,—where the will itself was lost. But the probate, or an office copy thereof, is now sufficient evidence of the will as regards real estate, except when the validity of the will is put in issue: 20 & 21 Vict. c. 77, s. 64. In important matters, the copy should be examined with the original will.

Where a purchaser from devisees is entitled to the concurrence of the heir-at-law, or to have the will proved *per testes*.

If the memorandum of attestation of a will of real estate (made before the operation of the Wills Act) does not state that the will was attested by the three witnesses in the testator's presence (or, in cases within that Act, that it was attested by the two witnesses, in the presence of the testator, and in the presence of each other), though this statement is not essential to the validity of the will; yet it seems to be the better opinion, that the purchaser would be entitled to insist on the concurrence of the heir, or that the will should be proved *per testes*. And it is thought by some, that where the attestation is informal, it can be supported, if an affidavit by the witnesses that they subscribed the will in the testator's presence is produced: Coventry, Conv. Evid. 97. Sometimes an unproved will is in the hands of a third person. In such a case, the purchaser is entitled to have it proved, and the circumstance that the heir-at-law has joined in the conveyance does not negative this

right; for it might happen that a devise had been made by the testator in favour of some other party; and, therefore, without seeing what the will contained, it would be impossible to say whether the vendors had a good title to the premises: *Coppard* v. *Harrison*, 2 Cox, 318. It does not appear in this case, that a covenant for the production of the will had been offered. If a purchaser were entitled to reject such a covenant, it would not be on the ground that the probate of it gives to the will additional value, as evidence of title relating to the real estate (which clearly it does not): but where it embraces personalty, as wills commonly do, it ought to be proved; and hence it is, that the Probate Registry is the general repository of wills, both of real and personal estate. Proof of Writings, &c.

Deeds and other Private Documents.]—The practice of conveyancers with respect to the admission of documents proceeds upon the assumption that forgery has not been attempted. The proof of execution and handwriting is therefore dispensed with. But it is always necessary to see that the document has come from the proper custody. The well-known rule of law is, that every attested instrument must be proved by the attesting witness, if alive, unless thirty years have elapsed from the time of its execution. But if the instrument bears any material erasure or interlineation, or does not appear to have come from the proper custody, it should be proved, although thirty years old. A deed or will more than thirty years old, and not bearing erasures or alterations, is considered to prove itself, even though the witnesses may be living (*Doe* v. *Burdett*, 4 A. & E. 19); or in the case of a will, though the testator may have died within the thirty years: *Marsh* v. *Collnett*, 2 Esp. 665. As to what is proper custody, see *Doe* v. *Samples*, 8 A. & E. 151; *Roe* v. *Rawlings*, 7 East, 279. It is doubtful whether this rule applies to the seal of a corporation. See remarks of Lord *Tenterden* in *R.* v. *Bathwick*, 2 B. & A. 648. Deeds, &c.

The rule that signatures and handwriting need not

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be proved applies, not only to deeds and wills, but also to letters, receipts, and other written documents which purport to be more than thirty years old, and come from proper custody: *Doe* v. *Beynon*, 12 A. & E. 431; *Wynne* v. *Tyrrwhitt*, 4 B. & A. 376; *Bertie* v. *Beaumont*, 2 Pr. 308; and see Taylor, Ev. 106.

Loss of deeds.

The vendor must produce the original deeds, or explain the absence of them. Verified copies merely are inadmissible, unless the originals are lost. See *Harvey* v. *Phillips*, 2 Atk. 541; *Southby* v. *Hutt*, 2 Myl. & Cr. 207; *Bryant* v. *Busk*, 4 Russ. 1; *Skeffington* v. *Whitehurst*, 3 You. & C. 1. In the latter case, an entry in a solicitor's bill of costs was considered to furnish evidence of the execution of a release. If a deed has its seals torn off, evidence may be given to show that it was originally sealed: *Argoll* v. *Cheney*, Palm. 402; *Matthewson* v. *Lydiate*, Cro. El. 546; *Bolton* v. *Bishop of Carlisle*, 2 H. Bl. 259; see 5 B. & C. 231; Gilb. Ev. 96, 6th ed.; *Crawford* v. *Lindsay*, 2 H. L. Cas. 534, 543, 550; Taylor, Ev. 162. As to enrolled deeds, *vide ante*, p. 161.

Livery of seisin.

Livery of seisin may be presumed after twelve years' consistent possession: *Rees* v. *Lloyd*, Wightw. 123. See *Jackson* v. *Jackson*, Sel. Ch. Ca. 81.

Evidence of title to copyholds.

Copyholds.]—The regular evidence of surrenders of, and admissions to, copyholds, are copies of court rolls, signed by the steward and duly stamped; but the requisitions of the General Stamp Act do not prevent the use of the original rolls: *Doe* d. *Bennington* v. *Hall*, 16 East, 208; *Doe* d. *Garrod* v. *Olley*, 12 A. & E. 481; 4 Jurist, 1084. The copy of a deed of surrender out of court is evidence, although the Stamp Act requires the original deed or memorandum of surrender to be stamped: *Doe* d. *Hawthorn* v. *Mee*, 1 Nev. & M. 424; 4 B. & Ad. 617. As to proving a surrender which has been omitted to be entered on the rolls, see *Doe* d. *Priestly* v. *Calloway*, 9 D. & Ry. 518; 6 B. & Cr. 484; *Rex* v. *Thruscross*, 3 Nev. & M. 284; 1 Ad. & E. 126. It seems a surrender may be presumed after long enjoyment (*Wilson* v. *Allen*, 1 Jac. & W. 611; *Lyford* v. *Coward*,

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1 Vern. 195); and admission, in pursuance of a surrender, which is proved, may, in like manner, be inferred after enjoyment, particularly when coupled with proof of payment of the customary rents, and performance of the customary services: *Blunt* v. *Clark*, 2 Sid. 61; *Roswell* v. *Welsh*, 3 Bulst. 214; *Rawlinson* v. *Grieves*, Id. 239; Walk. Copyh. 269, n. Acceptance of a surrender by the surrenderee, or an enfranchisement to him, is evidence of the same kind: 3 Bulst. 237; *Cookes* v. *Hellier*, 1 Ves. sen. 234. As to the necessity of proving the steward's handwriting, see 1 Keb. 567, 720; Fortesc. 43; 1 Str. 654; 2 Atk. 44; Doug. 26; 6 M. & Sel. 38; 1 Jac. & W. 617.

Evidence of custom.

Copyholds—Custom.]—In practice, the certificate of the steward of the manor is generally considered to be sufficient evidence of the custom of such manor, as to descents, &c.; but in court, the regular mode of proof is by the presentment of the homage, and evidence from the rolls of its having been followed in particular instances: *Doe* d. *Foster* v. *Sisson*, 12 East, 62. No inference can be drawn upon a trial, as to the existence of the custom in a particular manor, from the customs of adjacent manors: *Lowther* v. *Raw*, 2 B. P. C. 451; *Doe* d. *Breber* v. *Parker*, 5 T. R. 26; *Locke* v. *Colman*, 1 My. & Cr. at p. 430; but see *Dean and Chapter of Ely* v. *Warren*, 2 Atk. 189. The customary of a manor, which is usually made out by the steward, often from the presentment of the homage, but always expressed to be made *ex assensu omnium tenentium*, is admissible evidence (*Denn* d. *Goodwin* v. *Spray*, 1 T. R. 466); even without evidence of the custom having been followed in the particular point which it is produced to prove: *Roe* v. *Parker*, 5 T. R. 26. See *Ratcliffe* v. *Chaplin*, 4 Leon. 242. Evidence of reputation is also admissible: *Doe* d. *Foster* v. *Sisson*, 12 East, 62; *Locke* v. *Colman*, 1 Myl. & Cr. at p. 430. So, too, depositions purporting to have been made by copyholders in an ancient suit: *Freeman* v. *Phillipps*, 4 M. & S. 486. The custom will not, in any case, be extended any further than it is

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strictly proved. Thus, from evidence of a custom that the youngest son shall succeed, it will not be inferred to be the custom, that, in default of lineal heirs, the youngest brother, or the youngest cousin shall succeed: Id., *et ante*, p. 140. The same evidence cannot be used to prove a custom that is relied upon to support a *prescription*, the two claims being obviously inconsistent: *Blewitt* v. *Tregonning*, 3 Ad. & E. 554.

Evidence of identity.
Identity of parcels.

Identity of Parcels.]—The ordinary collateral sources of identification, where the descriptions of the parcels are unsatisfactory, are old plans, leases, books of deceased stewards, extracts from the land-tax and parish assessment books; affidavits of old persons, &c. See *Parry* v. *Hindle*, 2 Taunt. 180; *Barry* v. *Bebbington*, 4 T. R. 514; *Doe* d. *Strode* v. *Seaton*, 2 Ad. & E. 171; *Pim* v. *Currel*, 6 M. & W. 234; *Evans* v. *Rees*, 10 Ad. & E. 151; *Wilkinson* v. *Allott*, 3 B. P. C. 684. As to the conclusiveness of a map drawn on the margin of a deed, see *Taylor* v. *Parry*, 1 Scott, N. C. 576; *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1.

There is no point in which titles are so generally defective as in evidence of identity. The early deeds frequently contain no other than a general description, or, which is still more unsatisfactory, the names and contents of fields specified in them are no longer applicable, and probably had ceased to be so long before they were disused, conveyances being usually prepared by persons who are not locally acquainted with the property, and who continue to convey the lands by the old description, without noticing the changes of names and boundaries (which almost every estate gradually undergoes), until at length there is very little or no apparent connection between the lands described and the lands intended to be conveyed. Recourse must then be had to parol evidence of identity, and how defective this evidence commonly is, every day's experience attests. The evil would in a great measure be prevented if, in preparing conveyances, care was taken to notice the alterations of this

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nature which have occurred since the last conveyance of the property (*i*).

General description of copyholds on court rolls held to be sufficient.

In a modern case, an objection to a title of copyholds, on account of the vagueness of the description on the court rolls, and its alleged inadequacy to comprise the lands in question, was overruled as immaterial, when it was established by the evidence in the case that the property had actually passed and been enjoyed by the description contained in the court rolls: *Long* v. *Collier*, 4 Russ. 267.

Identity of parcels.

See the stat. 2 & 3 Will. 4, c. 80, intituled, "An

(*i*) The use of maps or plans in the margin of deeds, according to the present practice, though a great help to the identification of parcels, and sufficient to prevent any ambiguity that might arise from mere changes of ownership and occupation, is not calculated to guard against the confusion caused by alterations in the physical conditions of the surface itself. The most effectual method of quieting titles on the subject of identity and boundaries, would be by the use of authorized district maps on a large scale, prepared and kept by public officers in a manner resembling the system of registering maps, which has long been used with great benefit in Norway and Sweden, Germany, Holland, Switzerland, the Tyrol, Denmark, Belgium, France, and Italy, as well as in America and the Colonies. Since the 3rd ed. of this work was published, many well-known attempts have been made to create a system of Land Registry, the last being Lord Selborne's comprehensive bill for compulsory registration in 1873. But independently of the question of registration, much might be done by the parties interested, even without legislative assistance, by making use of the new ordnance maps on the large scale of 25 inches to a mile, which affords a very obvious means of giving greater accuracy and permanence to the description of parcels. In consequence of the report of the committee appointed in 1879 to consider the question of transfer and titles of land, steps have now been taken, by doubling the working staff, to complete the ordnance survey on the scale of 25 inches to a mile in the year 1890. There are also to be maps (of which many, including London, have been published) of all towns of over 4,000 population, on the scale of 10 feet to a mile. Maps of the following counties had been published in December, 1882:—Berks, Bucks, Chester, Cumberland, Denbigh, Durham, Essex, Flint, Glamorgan, Hants, Hertford, Kent, Middlesex, Northumberland, Oxford, Surrey, Sussex, Westmoreland, beside the Isle of Man, and various isolated parts of the country. For a list of town maps published on the larger scale, and other information, the reader is referred to the Report of the Ordnance Survey, 31st December, 1882. The price of a sheet 38 by 25 inches is, for counties, from 2*s.* 6*d.* to 22*s.*, and for towns, 2*s.* to 15*s.*, according to the amount of colour.

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Act for authorizing the Identifying of Lands and other Possessions of certain Ecclesiastical and Collegiate Corporations;" and, as to the powers of commissioners of inclosure to determine boundaries, see stat. 3 & 4 Vict. c. 31 (*j*).

Stock in the funds.

Stock.]—A transfer of stock may be proved by an examined copy of the transfer in the bank books, the parties' handwriting being proved: *Mortimer* v. *M'Callan*, 6 M. & W. 58; 4 Jurist, 172. When the conduct of a vendor of stock, held in trust under a will, had not been perfectly open and regular, the certificate of a stockbroker that there was then standing in the bank books the sum of 3,100*l.* in the joint names of the three trustees of the will, was held insufficient. The fund was sold under a mortgage made after the testator's death. Lord *Langdale*, M. R., laid down that the purchaser was entitled to evidence of the identity of the stock, and also that it was subject to the trusts of the will, for on that the vendor's title depends: *Hobson* v. *Bell*, 2 Beav. at p. 22.

As to proving the adequacy of the purchase-money on the purchase of reversions.

Evidence of Title to a Reversion.]—A peculiar doctrine formerly applied in equity to the sale of a reversion, which threw upon a person purchasing property of this nature the obligation of proving the fairness of the transaction; and it was accordingly always advisable, where the transaction of the purchase had not become unimpeachable by the acquiescence of the parties in whom the right to disturb it resides, to restrain the purchaser from requiring evidence that a fair price was given. See *Boswell* v. *Mendham*, 6 Madd. 373.

A less strict rule obtained where the future interest was dependent on a contingency of such a nature as to be incapable of being the subject of estimate or calculation, as that of the prior tenant for life (who in the case cited was a bachelor) not leaving issue (*Baker* v. *Bent*, 1 Russ. & Myl. 224); and family arrangements were always considered to

(*j*) The question of identification of parcels will be more fully treated under the title "Conditions of Sale."

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be in some measure exempt from the rule: *Tweddell* v. *Tweddell*, Turn. & R. 1, 13; *Houghton* v. *Lees*, 1 Jur., N. S. 862.

Stat. 31 & 32 Vict. c. 4.

And now, by 31 & 32 Vict. c. 4, s. 1—

No purchase made *bonâ fide* of reversionary interests to be set aside merely on the ground of undervalue.

"No purchase, made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside *merely* on the ground of undervalue."

And, by sect. 2, "Purchase" is defined as—

"Every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired."

But the Act is carefully limited to purchases made *bonâ fide* and without fraud or unfair dealing, and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief: Per Lord *Selborne*, C., in *Aylesford* v. *Morris*, L. R., 8 Ch. at p. 490. See also *Bolingbroke* v. *O'Rorke*, 2 App. Ca. 814 (*k*).

Evidence of assent.

Assent of Executor.]—In transactions which took place at a remote period, the rule is, *ex diuturnitate temporis omnia præsumuntur solemniter esse acta* (Co. Litt. 6 a; 2 Inst. 118, 362); and therefore a title depending either on an assignment by an executor, or by a legatee, without any express evidence of an assent, is accepted without any difficulty. But in transactions of a recent date, the caution is generally adopted of having the concurrence of the legatee and the executor in the assignment; of the legatee, to obtain his admission that there has been no previous assent to the bequest, and that the term still remains in the executor; and of the executor, to pass the term in that character. When the assignment is from the legatee alone, it is particularly important to have some evidence of the executor's assent to the legacy; and, in general, the consent

(*k*) The inadequacy of the price given may be so great as to amount to evidence of fraud sufficient to set aside the purchase, whether the property be in possession or reversion. See *Miller* v. *Cook*, L. R., 10 Eq. 641; *Tyler* v. *Yates*, L. R., 6 Ch. 665.

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of the executor, or other personal representative, is required to be testified by his concurrence in the deed of assignment, and by a confirmation thereof. To obviate the necessity of such concurrence, it is, as a point of practice, advisable that every legatee of a term for years should have an express assignment from the executor, or at least an instrument declaring his assent to the legacy: 3 Prest. Abst. 145.

Any expression or act which shows the executor's concurrence, or agreement, will amount to an assent.

But assent is only a perfecting act, for it is the will of the testator which gives the interest to the legatee, and therefore the law does not require any exact form in which it is to be made. Hence any expression or act done by the executor, which shows his concurrence or agreement to the thing bequeathed, will amount to an assent: 4 Bac. Abr. Gwill. ed. 444, *Legacies* (L.); *Noell* v. *Robinson*, 1 Vern. 94. For the executor's assent being analogous to a tenant's attornment to the grant of a reversion, a small matter will be construed an assent (Wentw. Off. Ex. 226; *Noell* v. *Robinson*, 2 Ventr. 358); and whatever verbal agreement will amount to an attornment may constitute an assent to a legacy: Shep. Touchs. 456; Godolph. Orphan's Legacy, 144; Wentw. Off. Ex. 224. Expressions to the following effect have been adjudged to amount to an assent:—"God send you joy of your bequest."—"I intend you to have your legacy according to the devise:" Com. Dig. *Administration* (C. 6.); *Doe* d. *Sturges* v. *Tatchell*, 3 B. & Ad. 675. The executor's allowing the legatee of a term to receive the rents for a time only, or applying the rents for the devisee's maintenance during minority, when they were directed to be so applied by the will, has been considered an implied assent: *Colbourne* v. *Mixtone*, 1 Leon. 129; *Paramour* v. *Yardley*, Plowd. Com. 539; 1 Rop. Leg. 251, 2nd ed. And see Williams on Executors, 1378 *seq.*

Before an assent or assignment can be given in evidence, probate must be obtained.

Although an executor may assent to a legacy or assign a term before probate, yet the assent or assignment cannot be given in evidence as an assent or assignment by the executor, without showing probate of the will, in proof of his being the executor. Thus, till probate is obtained, there is a

Evidence.

good assent or assignment for all the purposes of title; but there is not any legal evidence to prove the right to make such assent or assignment: see 1 Cru. Dig. 264, s. 32. As soon as probate has been obtained, then the defect of evidence is supplied, and there is a good title in point of fact and of law, and the relevant and proper evidence to support that fact. The doctrine that an executor may assign or release before probate, has frequently led to the conclusion, that a title would be good without obtaining probate (see Dyer, 367, a, (39)); and vendors have resisted the right of a purchaser to require the will should be proved. It seems clear, beyond all doubt, that in transactions of a recent date, the purchaser is entitled to require that the will should be proved; but there are many cases in which a purchaser may forego his strict right without any risk to his title. The will may be proved at any time, and even after the death of an executor; and whenever the will shall be proved, the assent or assignment will be admissible in evidence, and establish the deduction of the title from the executor: 3 Prest. Abst. 146; *vide infra*, tit. ASSENT.

Presumption of assent.

When a devisee of a term enters and remains in possession for a long time (as four or five years), that is evidence of assent to the devise on the part of the executors; and where the devisee had quitted possession shortly after entering, it was left to the jury to determine whether that was evidence of assent; and whether a contract by the devisee to grant an underlease was entered into in her own right, or as agent to the executors: *Richardson* v. *Gifford*, 3 Nev. & M. 325 (*l*). Where a leasehold estate was devised to A., and the administrator with the will annexed paid the rent for six years, and charged it

(*l*) Whether or not the assent of an executor has been given to a legacy, is a question of fact for the jury, even though it "depends upon the careful and somewhat critical comparison of the terms of a deed with other circumstances and facts of the case:" per *Alderson*, B., in *Mason* v. *Farnell*, 12 M. & W. at p. 682.

Evidence.

to A., it was held, in ejectment by A., to be sufficient evidence of the administrator's assent: *Doe* d. *Maberley* v. *Maberley*, 6 Car. & P. 126. But where a life interest in furniture was given to an executrix, her taking possession was held to be no assent to the bequest in remainder: *Richards* v. *Browne*, 4 Scott, 262. See also *Doe* d. *Hayes* v. *Sturges*, 7 Taunt. 217; 2 Marsh. 505; *Foley* v. *Burnel*, 4 Br. P. C. 34. After the death of the executor, having paid the debts, his assent may be presumed: *Cray* v. *Willis*, 2 P. Wms. 531.

Redemption of land-tax.

Land-tax.]—Redemption of the land-tax is proved by the certificate of the commissioners, with the receipt of the cashier of the Bank of England, and memorandum of registration. See 42 Geo. 3, c. 116, s. 38. See also *Buchanan* v. *Poppleton*, 4 C. B., N. S. 20. Land-tax is presumed to be a charge on property agreed to be sold, unless the contrary is stated in the agreement. As to the validity of sales by bodies corporate, for the purpose of redeeming the land-tax, see sects. 69, 76 of that Act, and 16 & 17 Vict. c. 117; and see *Warner* v. *Potchett*, 3 B. & Ad. 921. As to merger of redeemed land-tax, see *Blundell* v. *Stanley*, 13 Jur. 998; *Neame* v. *Moorsom*, L. R., 3 Eq. 91; also *Kilderbee* v. *Ambrose*, 10 Exch. 454, where the tax had been redeemed by an ecclesiastical incumbent.

Note.—In the third edition of this Work, at p. 188, there followed in this place tables of the regnal years of the kings of England and of law terms, &c. The practice of giving, in abstracts, the date by reference to regnal years having for many years past become obsolete, and law terms having been abolished, so far as relates to the administration of justice (see Judicature Act, 1873, sect. 26), it has not been considered worth while to reproduce these tables in the present edition.

PRECEDENTS.

I. *ABSTRACT OF THE TITLE of* JOHN WHITE, ROBERT SMITH, *and* THOMAS BROWN (*Mortgagees selling under their Statutory powers of Sale*) (*a*), *to certain Freehold Messuages and Hereditaments in the Parish of Thorpe, in the North Riding of Yorkshire.*

Dec. 8 & 9, 1840. INDENTURES OF LEASE AND RELEASE, by way of mortgage, BETWEEN William Watts, of the one part, and John Murray, of the other part.

IT WAS WITNESSED, in consideration of £1,000 to said William Watts, paid by said John Murray, said William Watts did grant, bargain, sell, remise, and confirm, unto said John Murray, his heirs and assigns (inter alia),

ALL that messuage or tenement, with the yard, orchard, barn, and other appurtenances unto the same belonging, commonly called Drake's, in the parish of Thorpe, in the North Riding of the county of York, in a street there, called Jock's End, between the King's highway or street there on the west part thereof; the messuage thereinafter mentioned and a land sometimes called Smith's way, on the north part thereof; a field called Scott's field, on the east part; and an inn, called the Cavalier, on the south part thereof; and then in the tenure or occupation of Thomas Wood, his under-tenants, or assigns:

AND ALSO ALL that other messuage, cottage, or tenement, situate, standing, and being in Thorpe aforesaid, in the said street called Jock's End, and adjoining to the aforesaid messuage or tenement, and commonly called or known by the name or sign of the Old Plough, being then in the tenure or occupation of Mary Edwards and John Metcalf, or one of them, their, or one of their assigns, or under-tenants:

(*a*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sects. 19, 20, 21 and 22; and see *post*, tit. MORTGAGES.

Dec. 8 & 9, 1840.

And also all and singular other the freehold messuages, cottages, lands, tenements, hereditaments, and premises whatsoever of him said William Watts, situate, lying, and being in Thorpe aforesaid;

And all and singular cellars, sollars, &c.;

And the reversion, &c.;

And all the estate, &c.:

To hold the same unto the said John Murray and his heirs:

To the use of the said John Murray, his heirs and assigns, for ever.

Proviso for making void the now abstracting indenture, on payment, by said William Watts, of £1,000, with lawful interest, on the 8th June, then next.

Covenant for payment of said £1,000 with interest.

Covenant by said William Watts, that he had right to convey;

Free from incumbrances;

That he was well seised;

For quiet enjoyment by mortgagee after default;

Free from incumbrances;

For further assurance after default;

Proviso for mortgagor's quiet enjoyment until default;

Covenant for insuring, and assigning policy of insurance.

Executed by all parties, attested, and receipt for consideration indorsed.

Registered at Northallerton, 27th February, 1841. B. 2, No. 419.

Sept. 8, 1844.

INDENTURE of Release, made in pursuance of the Act passed in the 4th and 5th years of the reign of her Majesty Queen Victoria, and intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties," Between said John Murray, of the first part; said William Watts, of the second part; and Henry Green, of the third part.

Reciting the hereinbefore abstracted indentures of the 8th and 9th December, 1840.

Reciting that the said principal sum of £1,000, secured by the said therein in part recited indentures, remained due to the said John Murray, together with £37 10*s.* 0*d.*, interest to the day of the date thereof.

It was witnessed, that in consideration of the sum of

Sept. 8, 1844. £1,037 10*s.* 0*d.* to said John Murray, by direction of said William Watts, paid by said Henry Green in discharge of principal and interest due, and in consideration of the further sum of £722 10*s.* 0*d.* to said William Watts, paid by said Henry Green, said John Murray did bargain, sell, release, and for ever quit claim, and said William Watts did grant, ratify, release, and confirm unto said Henry Green, his heirs and assigns.

ALL [the before abstracted premises];

AND all and singular cellars, sollars, &c.;

AND ALSO all and singular the freehold messuages, &c., of him, said William Watts, situate in the said parish of Thorpe;

AND the reversion, &c.;

AND all the estate, &c.:

To HOLD the same unto said Henry Green, his heirs and assigns;

To THE ONLY PROPER USE and behoof of said Henry Green, his heirs and assigns, for ever.

COVENANT by said John Murray that he had done no act to incumber.

COVENANT by said William Watts that he was well seised (subject only to the before abstracted indentures of mortgage): THAT he or said John Murray had right to convey, and for further assurance.

EXECUTED by all parties, and attested, and RECEIPT for consideration indorsed.

REGISTERED at Northallerton, 17th September, 1844.

July 3, 1854. THE SAID HENRY GREEN, by his WILL, of this date, gave and devised his freehold messuages, lands, tenements, and hereditaments whatsoever, with appurtenances, situate in the parish of Thorpe, aforesaid.

To John Foot, Thomas Wing, and Edward Morton, their heirs and assigns,

IN TRUST, that they, or the survivors or survivor of them, his heirs and assigns, should, as soon as might be after his decease, sell and dispose of the same by public auction.

AND for facilitating the sale thereof, he did order and direct that the receipts of the said John Foot, Thomas Wing, and

July 3, 1854. Edward Morton, or either of them, should be sufficient discharges for such purchase-money: And the said testator did give, devise, and bequeath the rents and profits of the said premises, and the purchase-money thereof, when sold, unto the several persons in his said will named, in manner therein mentioned: And the said testator appointed the said John Foot, Thomas Wing, and Edward Morton executors.

EXECUTED by said testator, and attested by Thomas Reid and Benjamin Ward (*a*).

PROVED, 15th January, 1861, in the Principal Registry of the Court of Probate.

REGISTERED at Northallerton, 30th Jan. 1861. B. 2, No. 176.

Nov. 6, 1860. THE SAID HENRY GREEN died.

Feb. 6, 1861. INDENTURE BETWEEN said John Foot, Thomas Wing, and Edward Morton, of the one part, and James Stone, of the other part.

RECITING the before abstracted will of said Henry Green;

RECITING sale by public auction:

IT WAS WITNESSED, that, in performance of the trusts thereinbefore recited, and in consideration of £2,000 paid to said Foot, Wing, and Morton, by said James Stone, said Foot, Wing, and Morton, did grant, bargain, sell, alien, release, and confirm unto said James Stone (in his actual possession, &c.), to his heirs,

ALL [the before abstracted premises];

TO HOLD the same unto said James Stone, his heirs and assigns:

TO THE USE of said James Stone, his heirs and assigns, for ever.

COVENANT by said Foot, Wing, and Morton, that they had done no act to incumber,

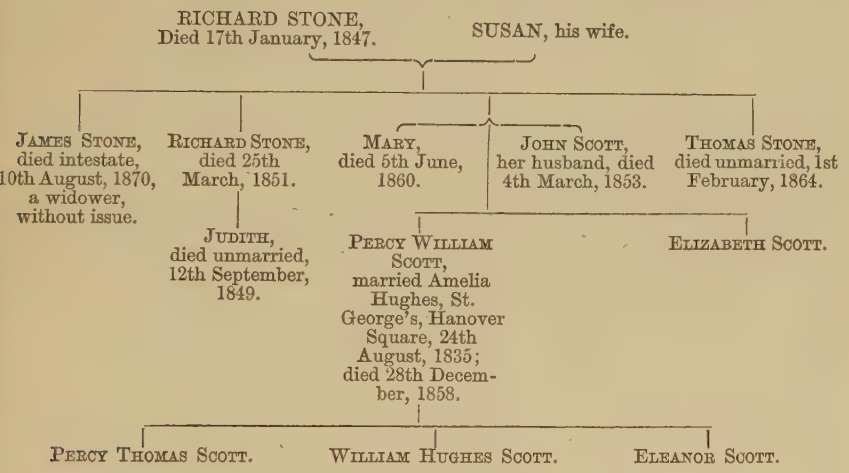
AND for further assurance.

EXECUTED by said Foot, Wing, and Morton, and attested, and RECEIPT for consideration indorsed.

REGISTERED at Northallerton, 8th March, 1861. B. 2, No. 177.

(*a*) The names of the witnesses to a will should always be stated, that it may be seen that no devise or bequest has been invalidated by the making the devisee or legatee a witness.

Aug. 10, 1870. The said James Stone died intestate, and without issue, whereupon the estate descended to Percy Thomas Scott, his heir at law, as appears by the following sketch of his pedigree:—


RICHARD STONE, Died 17th January, 1847.
SUSAN, his wife.
James Stone, died intestate, 10th August, 1870, a widower, without issue.
Richard Stone, died 25th March, 1851.
Judith, died unmarried, 12th September, 1849.
Mary, died 5th June, 1860.
John Scott, her husband, died 4th March, 1853.
Thomas Stone, died unmarried, 1st February, 1864.
Percy William Scott, married Amelia Hughes, St. George's, Hanover Square, 24th August, 1835; died 28th December, 1858.
Elizabeth Scott.
Percy Thomas Scott.
William Hughes Scott.
Eleanor Scott.

May 2, 1882. Declaration of Elizabeth Waters as follows:—"I, Elizabeth Waters, of the parish of Sudworth, in the county of Northampton, widow, do solemnly declare, that I well knew Richard Stone and Susan his wife, who many years since resided at Oldford Grange, which is in the parish of Cayfield, in the said county of Northampton, That the said Richard Stone died, and was buried at Cayfield aforesaid, in or about the year 1847, leaving the said Susan his wife widow, and four children him surviving, namely, James Stone, Richard Stone, Mary the wife of John Scott, and Thomas Stone. And I further declare, that I well knew the said James Stone, and that he married Anna Gilbert, at York, in the year 1842, and that she died shortly after the said marriage without issue, and that the said James Stone never married again, but died in the year 1870 without issue. And I further declare, that the said Richard Stone the younger had a daughter named Judith (who was his only child), and who died in his lifetime, namely, about the year 1849, unmarried. And I further declare, that I have been informed, and verily believe, that the said Mary Stone married one John Scott, and that they had one son, named Percy William Scott, and that he was drowned in the River Cam, in or about the year 1853, leaving lawful issue, namely, a son, named Percy Thomas Scott, and one younger son, and one

May 2, 1882. daughter; And I verily believe that the said Percy Thomas Scott is the grandnephew and heir at law of the said James Stone, and I make this declaration, &c. (Signed) E. Waters. Declared at Cayfield, in the county of Northampton, this 2nd day of May, 1882, before me, John Brown, a Commissioner to administer Oaths."

May 19, 1882. INDENTURE made by way of statutory mortgage, BETWEEN Percy Thomas Scott, of the one part, and John White, Robert Smith, and Thomas Brown, of the other part.

IT WAS WITNESSED, that in consideration of the sum of £2,500, paid to said Percy Thomas Scott by said John White, Robert Smith, and Thomas Brown, out of money belonging to them on a joint account (of which sum of £2,500 said Percy Thomas Scott thereby acknowledged the receipt), said Percy Thomas Scott, as mortgagor and beneficial owner, conveyed unto said John White, Robert Smith, and Thomas Brown (inter alia),

ALL [the before abstracted premises];

TO HOLD the same to and to the use of said John White, Robert Smith, and Thomas Brown, in fee simple.

FOR SECURING payment, on the 19th day of November, 1882, of the principal sum of £2,500, with interest thereon, at the rate of £4 per centum per annum.

PROVISO that said Percy Thomas Scott, or any person deriving title under him, should not, except with the consent in writing of said John White, Robert Smith, and Thomas Brown, or the persons or person deriving title under them, exercise the powers of leasing or of agreeing to lease conferred by the Conveyancing and Law of Property Act, 1881, on a mortgagee while in possession.

II. *ABSTRACT OF THE TITLE of* Mr. George Jones *to certain Lands and Tenements at Stoke, in the County of Norfolk, and Copyhold of the said Manor.*

Oct. 1, 1850. Benjamin Smith, of Stoke, in the county of Norfolk, Yeoman, a copyhold tenant of the said manor, personally went before the deputy steward of Samuel Evans, gentleman, steward of the said manor and of the courts thereof, and in consideration of the sum of £1,000 to him the said Benjamin Smith, then paid, advanced, and lent by James Marsh, of Cromer, in the said county, farmer, by way of mortgage (the receipt whereof was thereby acknowledged), did out of court surrender by the rod

All that one messuage or tenement, with a yard thereto adjoining and belonging, at Stoke. And also one piece of land, with a tenement thereupon built, lying between a way called Parson's Lane towards the south, and the lands then late of Andrew Clark towards the north, one head abutted on lands of the lord of the said manor towards the west, and upon New Street towards the east, and it contained by estimation 9 acres 1 rood and 15 perches, as appeareth by the survey book of the manor under the figure 1.

And also all that piece of land described in the award of the commissioners acting under the Stoke Inclosure Act by the No. 8, containing by measure 16 acres and 2 roods, bounded by land No. 7 east, No. 2 north, No. 9 west, and the drift way A, south;

And the revocation, &c.;

And all the estate:

To the only use and behoof of the said James Marsh, his heirs and assigns;

Upon condition to be void upon payment to said James Marsh, his executors, administrators, and assigns, of the sum of £1,000 on the day of with interest thereon at the rate of £ per cent.

Oct. 1, 1850. BY INDENTURE so dated, made between said Benjamin Smith, of the one part, and said James Marsh, of the other part:

Reciting that said Benjamin Smith was seised of the said hereditaments before described;

Oct. 1, 1850. And reciting that upon the application and request of said Benjamin Smith said James Marsh had agreed to advance him, and had advanced him, the sum of £1,000, upon having the repayment, with interest at £5 per cent., secured to him by a surrender of the said hereditaments, and by the covenant of said Benjamin Smith, thereinafter contained.

And reciting the conditional surrender before abstracted.

It was witnessed that in pursuance and further performance of the said recited agreement, and for the purpose of more effectually securing the repayment thereof, he, the said Benjamin Smith, for himself, his heirs, executors, and administrators did thereby covenant,

That he had good right to surrender:

For quiet enjoyment after default:

Free from incumbrances:

To insure against fire:

For further assurance:

Executed by the said Benjamin Smith, and attested: Receipt for £1,000 endorsed, signed and witnessed.

Oct. 3, 1860. The said Benjamin Smith by his will gave, devised, and bequeathed unto his son John Smith,

All and every his messuages, tenements, lands, hereditaments and real estate whatsoever and wheresoever of or to which he then was, or at the time of his decease should or might be, seised or possessed or entitled, whether in possession, reversion, remainder or expectancy, or otherwise howsoever;

To hold the same and every part thereof unto and to the use of his said son, his heirs, executors, administrators and assigns absolutely.

May 7, 1861. The said testator died.

Mar. 18, 1862. Will proved by the said John Smith alone in the District Registry of Her Majesty's Court of Probate at Norwich.

Aug. 22, 1869. The said James Marsh by his will appointed his sons Thomas Marsh and William Marsh executors thereof.

Mar. 3, 1871. The said James Marsh died.

May 30, 1872. Will of the said James Marsh proved (with a codicil not affecting such appointment) by the said Thomas Marsh and William Marsh in the Principal Registry of Her Majesty's Court of Probate.

Aug. 30, 1872. By Steward's copy Admission it appears that the said John Smith, of Stoke, came before the steward and alleged the death of the said Benjamin Smith, and his will as before abstracted. And thereupon the said John Smith prayed to be and was admitted to the hereditaments before described.

To hold to him the said John Smith and his heirs according to the form and effect of the said will of the said lord according, &c.

Nov. 13, 1873. By an acknowledgment of satisfaction under the hands of the said Thomas Marsh and William Marsh, and addressed to the chief steward of the said manor.

Reciting the surrender of the 1st October, 1850, before abstracted.

And reciting the death and will of the said Benjamin Smith.

And reciting the admission of the said John Smith on the 30th August, 1872, as before abstracted.

And reciting the death of the said James Marsh and his will, as before abstracted.

The said Thomas Marsh and William Marsh acknowledged to have that day received by payment of John Smith, of Stoke, the sum of £1,000, the principal money then due on the said conditional surrender, all interest having been paid by the said John Smith, and they authorize and require the said steward to enter on the court rolls of this manor full satisfaction and discharge on or for the said conditional surrender.

Nov. 13, 1873. BY INDENTURE of this date, made between the said John Smith of the one part, and George Jones of the other part.

Reciting, that the said John Smith was seised of the copyhold hereditaments thereinafter described for an estate of inheritance in possession to him and his heirs, according to the custom of the said manor, and the said John

Nov. 13, 1873. Smith had requested the said George Jones to advance him £800, which he had agreed to do on having the repayment thereof with interest secured to him in manner thereinafter expressed.

It is witnessed that in pursuance of the said agreement, and in consideration of £800 to the said John Smith then paid by the said George Jones (the receipt whereof is thereby acknowledged), he the said John Smith did thereby covenant with the said George Jones that he the said John Smith and all other necessary parties should at his own cost, and when required, surrender unto the lord or lords, lady or ladies of the said manor, according to the custom thereof.

To the use of the said George Jones the premises aforesaid by the description aforesaid:

And the reversion, &c.;

And all the estate:

To hold the same to the said George Jones, his heirs and assigns, at the will of the lord or lords, lady or ladies of the said manor by copy of court roll, but subject to the condition then following, namely:

Condition to make void the now abstracting surrender on payment by the said John Smith, his heirs, executors, administrators, or assigns, to the said George Jones, his executors, administrators, or assigns, for the sum of £800, with interest at £5 per cent. per annum, on the 31st April then next.

Covenants by the said John Smith, for payment of the said principal sum, with interest, on the said 30th day of April;

And also, that if default should be made in payment of the said sum of £800, and of the interest thereof, or any part thereof, and the said George Jones, his executors, administrators, or assigns should have delivered to the said John Smith, his heirs, executors, administrators, or assigns, or left at his or their last known place of abode in England, or left upon the same premises or some part thereof, a notice in writing demanding payment thereof, and two calendar months should have elapsed from the time of the delivery or leaving of such notice as aforesaid, it should be lawful for the said George Jones, his executors, administrators, or assigns (without prejudice to his or their right of foreclosing the equity of redemption of the said hereditaments, or of taking admission to the same, and without any further consent or concurrence of the said John

Nov. 13, 1873. Smith, his heirs and assigns) absolutely, to sell the said premises, and either by public auction or private contract, and subject to such conditions of sale as he should think fit, and with liberty to buy in the same or any part thereof, and to rescind any such contract, and to re-sell the same in manner aforesaid without being liable for any loss occasioned thereby, and to surrender and assure the same premises to the purchaser and purchasers thereof, and to receive and sign and give receipts for the purchase-moneys, which receipts shall discharge the persons paying the moneys therein respectively expressed to be received from all liabilities and responsibility on account thereof; And that it should be lawful to and for the said George Jones, his executors, administrators, and assigns, out of the proceeds of such sale as aforesaid, after retaining the said sum of £800 and the interest thereon, or for so much thereof respectively as shall be then due, and also all expenses incident to or incurred in relation to such sale as aforesaid, to pay the residue (if any) of the moneys aforesaid which should then remain in their hands unto the said John Smith, or other the person or persons entitled thereto;

And also, that the said John Smith had good right to surrender;

And further, that until admission should be taken under such surrender, he the said John Smith and his heirs should stand seised and possessed of the said hereditaments, Upon trust for the said George Jones, his heirs and assigns, subject, nevertheless, to the condition for making void the surrender as aforesaid;

And that it should be lawful for the said George Jones, his heirs and assigns, in case default should be made in payment of the said sum of £800, and at all times thereafter until repayment of the said principal money and interest, and every part thereof, to take admittance to the said hereditaments, and whether before or after such admittance peaceably and quietly to enter into and upon, and to have, hold and enjoy the same, and to take the rents and profits thereof to and for his and their own use and benefit, without any interruption whatsoever by the said John Smith, or his heirs or assigns, or any other person whatsoever;

And that free from incumbrances (the rents, suits and services of the lord of the said manor, and the existing tenancies of the said premises only excepted);

Nov. 13, 1873. For further assurance;
To keep all the buildings insured against loss or damage by fire.
And the said John Smith did irrevocably appoint the said George Jones, his executors and administrators, his true and lawful attorney and attorneys for him and in his name and on his behalf, at any time after any sale or sales under the power of sale thereinbefore contained, to surrender

All and singular the said hereditaments and premises with appurtenances;

To the use and behoof of the purchaser or respective purchasers thereof, his, her, or their heirs and assigns for ever, or as he, she, or they should direct, according to the custom of the said manor.

Executed by both parties, duly attested, and receipt for the consideration money indorsed, signed and witnessed.

Nov. 22, 1873. The said John Smith personally went before the steward of the said manor and of the courts thereof, and in consideration of the said sum of £800, so paid to him before the execution of the last abstracted indenture, did out of court surrender out of his hands into the hands of the lord of the said manor, by the hands, &c.:

The premises aforesaid, by the description aforesaid;
And the reversion, &c.;
And all the estate, &c.:

To the only use and behoof of the said George Jones, his heirs and assigns, for ever:

Upon condition to be void on payment to the said George Jones, his heirs, executors, and administrators, of the said sum of £800, with interest, on the 30th day of April then next.

Apr. 15, 1881. By a notice in writing, under the hand of the said George Jones, he thereby gave notice to the said John Smith, and required him to pay at the expiration of two calendar months from the giving to or leaving for him of that notice the said principal sum of £800, and all interest, whichever should be then due thereon;
And he did thereby further give notice, that if the said John Smith should make default in such payment, or either of them, he should proceed to sell the hereditaments described in the said

Apr. 15, 1881. conditional surrenders and indentures respectively, in pursuance and performance of the power for that purpose then vested in him, and contained or referred to in the said indentures respectively.

III. *ABSTRACT OF THE TITLE of* JOHN WILLIAM BACON, *Esq., to Freehold and Copyhold Estates at Hendon, in the County of Middlesex.*

36 H. 8, June 9. BY INDENTURE of this date, made between the King and the Dean and Chapter of St. Paul's, London,

RECITING a conveyance to the King of divers hereditaments in Essex, in consideration whereof

The King bargained and sold (inter alia),

The manor of Layton, cum̃tiis, late belonging to the priory of St. John of Jerusalem:

TO HOLD the same unto the Dean and Chapter of St. Paul's, and their successors, for ever, in Frankalmoyne, at the yearly rent of £33 : 0*s.* 3*d.*, clear of all other outgoings.

TAKEN and acknowledged 31st May, 36th Henry 8th, by Sir J. Rich.

EXECUTED by Dean and Chapter.

14 Eliz. Aug. 1, 1572. BY A GRANT from the Queen to the Dean and Chapter of the cathedral church of St. Paul's, London, and to their successors,

RECITING, that her father, Henry 8th, had, by his letters patent, given and granted to the said Dean and Chapter (inter alia), all his manor of Layton, in the county of Middlesex, hereinbefore mentioned.

TO HOLD the same to the said Dean and Chapter, and their successors, at the yearly rent of £33 : 1*s.* 1*d.*, for all rents and services to be rendered or paid:

IT IS WITNESSED, that for the considerations therein mentioned, the said Queen did give, grant, remise, and release to the aforesaid Dean and Chapter,

ALL the aforesaid yearly rent of £33 : 1*s.* 1*d.*, reserved as aforesaid by the thereinbefore recited letters patent:

14 Eliz. Aug. 1, 1572. To HOLD the same to the Dean and Chapter, and their successors, for ever.

To THE USE of the said Dean and Chapter, and their successors for ever.

AND FURTHER, that for the considerations aforesaid, the said Queen did grant to the aforesaid Dean and Chapter, that they should have her letters patent, duly made and sealed, without fine or fee whatsoever, the statute against putting lands and tenements into mortmain in anywise notwithstanding.

EXECUTED by the Queen herself at Gorhambury, 1st August, 1572 (*a*).

Nov. 3, 1797. 38 Geo. 3, c. 5, AN ACT OF PARLIAMENT, which granted an aid to his Majesty, by a land-tax to be raised in Great Britain for the service of the year 1798. (A printed copy accompanies this abstract.)

June 21, 1798. 38 Geo. 3, c. 60, AN ACT OF PARLIAMENT for making perpetual (subject to reduction and purchase) the several sums of money then charged in Great Britain as a land-tax for one year, from the 25th day of March, 1798.

SECTION 11 EMPOWERS all bodies politic, corporate or collegiate, and corporations aggregate or sole, seised or possessed of any manors, messuages, lands, tenements, or hereditaments, whereon any land-tax thereby made saleable shall be charged, to contract and agree for the reduction of such land-tax, or any part thereof, notwithstanding any statutes of mortmain or other statutes to the contrary.

SECTION 19 EMPOWERS all bodies politic, &c., in the actual possession of or entitled beneficially to the rents and profits of such manors, &c., under the restrictions or regulations thereinafter mentioned, to sell such part or parts of such manors, &c., as shall be eligible and necessary for the purpose of redeeming or purchasing such land-tax; and by indenture or indentures duly sealed and delivered, and enrolled for estates in England within

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(*a*) It seems to be the better opinion that the vendor would not be bound to furnish the purchaser with a copy of an ancient grant from the Crown; it is sufficient if he inform him of the place of its deposit.

June 21, 1798. six calendar months after the execution thereof in any of his Majesty's courts of record at Westminster, or registered in the counties of Middlesex and York, in the manner required by law, absolutely to convey the same, freed and discharged from land-tax, unto any person or persons whomsoever; or to charge a sufficient part of the said manors, &c., in manner therein mentioned.

(A printed copy of the Act accompanies this abstract).

Mar. 21, 1799. 39 Geo. 3, c. 29, An Act of Parliament to amend and render more effectual the two last-mentioned Acts;

Repeats various restrictive enactments in former Acts, and contains further enactments to amend those Acts.

(A printed copy of the Act accompanies this abstract).

April 3, 1800. BY INDENTURE of bargain and sale, enrolled, between the Right Reverend Father in God George Lord Bishop of Lincoln, Dean of the Cathedral Church of St. Paul's, London, and the Chapter of the same Church, of the first part, the Right Honourable William Lord Auckland, and the Right Honourable Sylvester Douglas (two of the Commissioners appointed by his Majesty's letters patent under the Great Seal of Great Britain, by virtue of the 39th Geo. 3, entitled, &c., being the Act lastly before mentioned), of the second part, and John Ford, of the third part;

Reciting, that the said Dean and Chapter were desirous of availing themselves of the powers which, by the several before-mentioned Acts of the 38th and 39th of George the Third, were given to bodies corporate, for enabling them to sell a competent part of the manors, &c., for redeeming or purchasing their land-tax, and had contracted to sell to the said John Ford the freehold estate and premises hereinafter described, being part of the estates which the said Dean and Chapter were entitled to, in right of the said Chapter, for the sum of £10,942 12*s.* 5*d.*, and that the said Right Honourable Commissioners, parties thereto, had agreed to confirm such contract:

It was witnessed, that in consideration of the sum of £10,942 12*s.* 5*d.* by the said John Ford paid into the Bank of England, to be there placed to the account of the Commissioners for the Reduction of the National Debt, as by the receipt of R. Aslett,

April 3, 1800. one of the cashiers of the bank, thereon indorsed did appear, the said Dean and Chapter, in exercise of the power vested in them by the several Acts hereinbefore referred to, did grant, bargain, sell, and convey by the now abstracting indenture, duly sealed and delivered, and intended to be enrolled or registered as the law required for the conveyance of estates sold to purchase or redeem land-tax, with the consent, authority, or approbation of the said Right Honourable Commissioners thereinbefore named, testified as therein expressed; and the said Commissioners did thereby confirm unto the said J. Ford and his heirs,

All that capital messuage, and site of the manor of Layton, with the appurtenances, situate in the parish of Hendon, in the county of Middlesex, together with all the outhouses, buildings, barns, stables, dovehouses, and other edifices, moats, ponds, yards, backsides, orchards, and gardens, to the said site and capital messuage of right belonging or appertaining: And also all demesne lands, meadows, &c.: And also all rents of assize, &c., excepting all that land or grove called the Priest's Grove, parcel of the demesnes of the said manor, containing by estimation one acre, and also excepting all lands, tenements, and hereditaments whatsoever, grantable by copy of court roll, and all courts baron, courts leet, and view of frankpledge, and all customary courts, and all perquisites of courts, fines, and other profits, and the advowson of Friern Barnet; And the reversion:

To hold the same unto the said John Ford, his heirs and assigns.

To the use of the said John Ford, his heirs and assigns, for ever, discharged from all land-tax and other incumbrances.

Covenant by the said Dean and Chapter that they had not incumbered.

Executed by the said John Ford, Lord Auckland and Sylvester Douglas, and the common seal of the said Dean and Chapter affixed thereto.

Receipt for consideration-money, under the hand of R. Aslett, thereon endorsed.

Enrolled in the Court of Common Pleas, 4th Geo. 3rd, Roll, 106.

Registered 14th March, 1807. B. 2. No. 471.

Jan. 3, 1834. WILLIAM FORD by his WILL,

AFTER RECITING that his son John William Ford had been disappointed of a legacy of £1,000, intended to have been bequeathed to him by his godmother, Mary Thompson, the late wife of Sir William Thompson, Bart., upon which he had relied to answer some temporary debts,

GAVE unto the said John William Ford the sum of £1,000 absolutely, and charged all his real estate with payment thereof, and subject thereto

HE GAVE, devised, and bequeathed unto his own two sons, J. W. Ford, and Francis D'Arcy Ford, and to their heirs, executors, and administrators.

ALL his real and personal estates of whatever nature or kind soever, and wheresoever the same might be, and of which he might die seised or possessed,

IN TRUST, nevertheless, as to one equal third part thereof, to and for the use and behoof of his said son John William Ford, his heirs, executors, administrators, and assigns, for ever;

AND AS TO one third part thereof,

IN TRUST for his said son Francis D'Arcy Ford, his heirs, executors, administrators, and assigns, for ever.

AND AS TO the remaining third part thereof,

IN TRUST, that they his said two sons, their heirs, executors, or administrators, should pay the rents, issues, dividends, interest, and produce thereof, into the hands of his daughter Maria, then Maria Thompson, the wife of Sir William Thompson, Bart., to and for her own separate use during her life, and not to be subject to the debts, &c., of any husband, and her receipts to be discharges; and from and after the decease of his said daughter,

THEN IN TRUST for the child or children of his said daughter living at the time of her decease, to be divided between or amongst them, if more than one, in equal shares and proportions; or if there should be only one such child, then to such only child, his or her heirs, administrators, or assigns.

BUT, in case his said daughter should have no issue, or no issue living at the time of her decease,

THEN he gave, devised, and bequeathed such remaining third part of his said estate and effects

Jan. 3, 1834. Unto his said two sons, their heirs, executors, administrators, and assigns, for ever, in equal shares.
And the said testator appointed his said two sons executors of his will.
Duly executed by the testator in the presence of, and attested by: Hugh Green, Richard John Butten, and Spencer Ward.

July 7, 1835. The said testator made a codicil to his said will, whereby he nominated and appointed his friend, Charles Anster, a trustee of his above-written will, to act in conjunction with his two sons, and that in as full and ample a manner as if he had been originally named a trustee in his said will.
Duly executed by the testator in the presence of, and attested by: Hugh Green, John Smith, and Benjamin Sadler.

Feb. 26, 1836. The testator died, and was buried at Hendon.
The said will and codicil were proved by the said John William Ford, and Francis D'Arcy Ford, only, in the Prerogative Court of Canterbury, the 16th May, 1836.
Registered in Middlesex, 24th May, 1836, B. 3, No. 1816.

Apr. 30, 1836. Elizabeth Mary Ford, widow of the testator, John Ford, died, and was buried at Twickenham, Middlesex.

Dec. 2, 1846. By a decree made in a cause wherein Francis D'Arcy Ford, Dame Maria Thompson, wife of Sir William Thompson, Bart., by the said Francis D'Arcy Ford, her brother and next friend, Georgiana Frances Amy Thompson, William Ford Thompson, D'Arcy Thompson, Anna Maria Thompson, Clara Thompson, and Arthur Luke Thompson, infants, by the said Francis D'Arcy Ford, their uncle and next friend, are plaintiffs, and John William Ford and Charles Anster, defendants.
It was ordered, that the bill be dismissed against the defendant, Charles Anster, with costs, and the defendant, John William Ford, by his answer admitting the will of John Ford, the testator in the pleadings named, It was declared, that the

Dec. 2, 1846. same ought to be established, and the trusts thereof performed; And it was ordered and decreed accordingly.

And the plaintiff, Francis D'Arcy Ford, submitting to account, It was ordered, that it be referred to Master Harvey, to take an account of the personal estate, debts, &c., of the said testator; And that the personal estate be applied in payment of his debts, funeral expenses, and legacies; And that the said Master inquire whether there was any part of the said testator's estate now remaining outstanding and incapable of being got in; And whether it would be for the benefit of Lady Thompson (Maria) and her children, that the defendant, John William Ford, should purchase certain household furniture and effects; And to inquire what real estates the said testator was entitled to at the time of his death, and for what estates and interests, and to take an account of the rents and profits; And to inquire whether there is any timber upon the said testator's real estates proper to be cut down; And in case, upon taking the account of the personal estate, he should find that the same was not sufficient for the payment of debts, funeral expenses, and legacies, then to state to the Court what part of the said testator's real estate it would be advisable should be sold to make up such deficiency; And he was to be at liberty, from time to time, to make a separate report or reports, and any of the said parties should be at liberty to apply.

July 3, 1848. The said Master, by his report (after stating the amount of the receipts and payments by the executors, and the amount of the testator's debts), found that the said personal estate was greatly insufficient to pay the said testator's debts and legacies; And he was of opinion that it would be for the benefit of the several parties interested in the said testator's estates, that the houses, buildings, and pieces of land which lay detached from the mansion-house at Layton, and grounds belonging thereto, should be sold to make up the deficiency; and in the second schedule to his report he had set forth a short description of the said premises proposed to be sold.

The First Schedule to which the report refers contains the particulars of the debts due from the estate of the said testator, and of the legacies given by his will remaining unsatisfied.

July 3, 1848. The Second Schedule to which the report refers containing a description of the estates proper to be sold, and amongst the rest,

An Estate, situate at Layton, in the county of Middlesex, consisting of the following particulars:

	A.	R.	P.
A newly erected house, barns, stables, yards, and garden	1	0	10
Red Field (alias Scott's Field)	8	2	0
Little Red Field	3	0	36
Brown's Close, next Freeman's	7	2	36
Upper Church Field	6	2	2
Freeman's Field	9	3	36
Dove Croft	1	3	37
New Inclosure	7	2	19
Ditto	8	2	21
Containing in the whole	a.55	0	37

In the occupation of Joseph Edwards, Esq., at the yearly rent of £300.

(This schedule does not contain any other part of the estates comprised in the present abstract.)

July 4, 1848. By an Order made in the said cause,

It was ordered, that the said Master's report be confirmed;

And that the several estates mentioned in the second schedule to the said report be sold, with the approbation of the said Master, to the best purchaser, in which sale all proper parties should join and produce all deeds, &c.;

And that the monies to arise by such sale should be paid into the bank in the name of the Accountant-General, and be laid out in the Three per Cents. in his name, in trust in the said cause.

July 8, 1848. Emily Thompson, another child of Sir William and Lady Thompson, was born. She was baptized at Croydon, Surrey.

Feb. 2, 1852. Decree on supplemental bill sets forth the birth of the said Emily Thompson, and decrees that she shall have the same benefit of the original bill as if she had been born before and made a party thereto.

Mar. 1, 1851. By a Deed Poll, under the hand and seal of the said Charles Anster,

Reciting the before abstracted will and codicil of the said John Ford, and his death;

And Reciting, that the said Charles Anster had never accepted the office of trustee given to him by the said codicil, or the devise and bequest implied by his nomination as trustee therein, nor had he ever acted or intended to act in the trusts of the said will.

It was witnessed, that the said Charles Anster did thereby absolutely renounce and disclaim

All and singular the lands, tenements, and hereditaments, goods, chattels, and real and personal estates of or belonging or late belonging to the said William Ford, deceased, devised and bequeathed in and by his said will and codicil, or either of them, and the devise thereof in the said codicil contained or implied, and the office of trustee by the said codicil given or intended to be given to him the said Charles Anster, and all right, &c.

Executed by the said Charles Anster, and attested.

Registered 27th May, 1854, C. 2, No. 1312.

July 3, 1851. By an Order on further direction made in the said cause, after noticing the sale of part of the real estates, It was ordered, that a partition should be made of all the freehold and copyhold estates of which the said William Ford died seised or possessed then remaining unsold, and that a commission should issue for that purpose, directed to certain commissioners to be therein named, to divide the same into three equal parts, and that one third part thereof should be allotted as the share of the said defendant, Francis D'Arcy Ford; one other third part thereof as the share of the said John William Ford; and the remaining third part thereof should be allotted unto the said Francis D'Arcy Ford and John William Ford, upon the trusts, &c., and subject to the contingencies in the said testator's will expressed concerning the remaining third part, and that the respective shares should be holden in severalty; and that after such partition should have been made, all proper persons should execute such conveyances as should be necessary for conveying the

July 3, 1851. several shares so to be allotted to the parties to whom the same should respectively belong, to hold the same in severalty.

Sept. 5, 1851. Westminster, 5 Sept., 14 & 15 Vict. By a Commission made in the said cause, directed to Barnard Cranstoun Cocker, John Addison, William Pole Attfield, and Francis Giles, gentlemen;

After reciting the lastly before abstracted order,

It was made known, that the Queen did give full power and authority unto them, or any three or two of them, to survey the estates in question in the said order and pleadings of the said cause mentioned, and according to the best of their skill, knowledge, and judgment, make a fair partition, division, and allotment thereof; and the same separate, set apart, and divide into three equal parts, and allot and appoint one third part thereof as and for the share of the complainant, Francis D'Arcy Ford, and one other third part thereof as and for the share of the defendant, John William Ford, and the remaining third part thereof unto the said Francis D'Arcy Ford and John William Ford, their heirs, executors, administrators, and assigns, upon the trusts, &c., and subject to the contingencies in the said will expressed concerning the remaining third part; the said respective shares to be held in severalty: and the parts so divided to distinguish and separate by certain metes and bounds; and to return unto the said Court of Chancery their facts and proceedings in the premises by their certificate, fairly written on parchment, together with depositions and interrogations, closed up under the seals of them, or any three or two of them.

Mar. 3, 1852. By a certificate of this date under the hands and seals of the said William Pole Attfield, and Francis Giles, the acting commissioners in the said commission, it was certified that they, the said William Pole Attfield, and Francis Giles, had surveyed the estate in question, in the order and pleadings of the said cause mentioned; and had, according to the best of their skill, knowledge, and judgment, made a fair partition, direction, and allotment thereof, and had separated, set apart, and divided the same into three equal parts, as by the said commission was directed, and had allotted and appointed, and did thereby allot and appoint unto the said John William Ford, (inter alia),

All that capital messuage or mansion-house, with the

Mar. 3, 1852. outhouses, barns, stables, yards, orchards, gardens, and appurtenances, called the Manor Farm, situate in Layton aforesaid, in the tenure or occupation of the defendant, John William Ford, and the site of which mansion-house, yards, gardens, and orchard contained by estimation 1a. 0r. 10p. or thereabouts;

And all those several closes, pieces, or parcels of land, arable, meadow, pasture and wood, situate in Layton aforesaid, commonly called the Manor Farm, that is to say, All that close, piece, or parcel of arable, meadow, or pasture land, commonly called the Thither and Farther Home Fields, and small close, containing by estimation 5a. 1r. 3p., bounded on the north in part by Hendon Watch estate, in part by Church Meadow, and in part by Manor House Garden and Farm; on the south, in part by Pond Field, otherwise Pound Field, and in part by Four Acres, and on the west, by three Corner Field and Six Acres.

As and for the share of the said John William Ford, which third part or share so allotted and appointed to the said John William Ford is comprised in that part of the map or plan thereunto annexed, which is distinguished by a blue tint or shade encircling the same, and is marked No. 3. And they further allotted and apportioned unto the said John William Ford, All the timber and timber-like trees, underwood, and fallers then being on that part of the lands and premises thereinbefore to him allotted and apportioned. And they further certified that the said partitions and divisions were in due proportions, &c.

Executed by the said William Pole Attfield and Francis Giles, and attested by two witnesses.

Mar. 9, 1852. The said certificate was absolutely confirmed by an order of the said Court of Chancery.

June 2, 1852. 3 Geo. 4, By an Act of Parliament intituled "An Act for carrying into effect a Partition of Real Estates devised by the Will of John Ford, Esq., and other Purposes, relating to such Estates."

Reciting as in the said Act is recited, a printed copy of which accompanies this abstract.

June 2, 1852. It is enacted, that the said partition and allotments of the freehold and copyhold estates described in the said certificate of partition (being the estates comprised in the three schedules to that Act), should be and were thereby established, ratified and confirmed.

And that all the said freehold and copyhold messuages, farms, lands, tenements, and hereditaments which in and by the aforesaid certificate were expressed to be thereby allotted to the said John William Ford, as and for his part or share in severalty of the estates directed by the said Court of Chancery to be divided as aforesaid, which estates and premises are particularly described in the third schedule to the said Act, with their appurtenances, should be vested in and stand settled and assured upon and to the use of Richard Cooper the younger, his heirs and assigns for ever, In trust for the said John William Ford, his heirs and assigns, for ever.

Proviso, That no person not being tenant to the lord should by virtue of that Act only become tenant of the said copyhold premises without an admission thereto by the lord of the manor, so as to entitle the lord to all such fines, &c., as he would have been entitled to if that Act had not passed; and that it should be lawful for any person who had any legal estate in the copyhold hereditaments thereby settled, to make any surrender or customary assurance of the same, To the uses and for the purposes of that Act, notwithstanding the limitations, trusts, or dispositions of the said will and codicil.

The usual saving clause,

And that the Act should be printed by the King's printer, and a copy thereof so printed should be admitted as evidence by all judges, &c.

The third Schedule to which the Act refers [being the allotments to the said John William Ford] contains (inter alia),

	A.	R.	P.
Manor House yards and farms . . .	1	0	10
Manor House plantation (copyhold) . .	0	3	23
Further Home Field, Hither Home Field, and Small Close	5	1	3

Timber and timber-like trees.

Aug. 4, 1852. INDENTURE of mortgage of this date, &c.

IV. *ABSTRACT OF THE TITLE of* Mrs. Jane Parsons, *Widow (selling under the powers given to Limited Owners by the Settled Land Act*, 1882), *of Cheapside, in the City of London, to a Leasehold House and Premises, in Queen Street, in the Parish of St. Dunstan in the East, London.*

Dec. 6, 1854. BY INDENTURE of lease between Robert Good, of the first part, John Taylor and James Brindall (administrators of all the goods, chattels, rights, and credits, of Robert Tudor, late citizen and builder of London, deceased), of the second part, and James Head of the third part; whereby, for the considerations therein mentioned,

Said Good, with the assent and by the direction of said Taylor and Brindall, Did demise, lease, and to farm let unto said Head, his executors, administrators and assigns,

All that piece or parcel of ground situate, lying, and being on the west side of a new street, called or designed to be called Queen Street, lying on the south side of King Street, in the parish of Saint Dunstan in the East, London, containing in front next Queen Street aforesaid, from north to south, 16 feet and 1 inch of assize; in the rear or back part thereof, from north to south, 61 feet and 3 inches of assize; and in depth on the north side, from east to west, 44 feet of assize; then turning northward 8 feet and 6 inches of assize; and from thence extending westward to the rear or back part of the said piece or parcel of ground, 40 feet of assize; and in depth on the south side, from east to west, 85 feet and 9 inches of assize; then turning southward 10 feet and 2 inches of assize; and from thence extending westward to the rear or back part of the said ground 3 feet and 9 inches of assize; and which said piece or parcel of ground doth abut east on Queen Street aforesaid, west on ground of William Watts, north on ground built or intended to be built on by him, the said James Head, and Isaac Lewis, and is more particularly mentioned and described in the plan or ground plot thereof, drawn and delineated in the margin of the now abstracting indenture. Together

Dec. 6, 1854. with the said brick messuage or tenement lately erected and built on part of the said piece or parcel of ground, and all other erections and buildings now erected and built or to be erected and built upon the said piece or parcel of ground, or any part thereof, Together also with all ways, &c.

To HOLD the same, with their appurtenances, unto the said Head, his executors, administrators, and assigns, from the 29th day of September, which was in the year 1854, for the term of ninety-nine years from thence next ensuing, at the rent of one peppercorn for the first two years and three quarters of a year, and at the yearly rent of £3 16*s.* for the remaining ninety-six years and one quarter of a year, payable quarterly.

COVENANTS by said Head with said Good, to pay rent, to build said messuages, to insure in Hand-in-Hand or Westminster Insurance Office to the highest value said offices commonly insure on houses; to repair, &c.; to leave, &c., at end of term; that lessors may enter and view said premises and give three months' notice of want of repair; to repair accordingly; and not to let, &c., to a victualler, without license of said Good.

PROVISO for re-entry on non-payment of rent.

COVENANTS by said Good, that he had right to demise and lease; and for quiet enjoyment.

COVENANT by said Good for quiet enjoyment.

EXECUTED by said Good, Taylor, and Brindall, and attested.

July 1, 1855. BY INDENTURE OF MORTGAGE between said Head, of the one part, and said Taylor, of the other part.

RECITING the before abstracted indenture of lease;

IT WAS WITNESSED, that in consideration of the sum of £1500, said Head did grant, bargain, sell, assign, and set over unto said Taylor, his executors, administrators, and assigns,

THE said indenture of lease;

ALL said premises;

AND all the estate, &c.:

To HOLD unto said Taylor, his executors, administrators, and assigns, from thenceforth for residue of said term of ninety-nine years.

July 1, 1855. PROVISO for redemption on payment of principal and interest on 12th January then next.

COVENANTS for payment of principal and interest, for title, &c.

EXECUTED by said Head, and attested.

RECEIPT for consideration indorsed.

Dec. 2, 1855. BY INDENTURE, indorsed on last abstracted indenture, BETWEEN said Taylor, of the one part, and George Balls, of the other part,

RECITING that within-mentioned principal sum was owing, with £33 6*s.* for the interest thereof;

Said Taylor, in consideration of £1533 6*s.*, paid by said George Balls, did bargain, sell, assign, transfer, and set over unto said George Balls, his executors, administrators, and assigns,

Said indenture of lease and indenture of mortgage; and

THE aforesaid premises, principal and interest;

AND all his estate, &c.:

TO HOLD unto said Balls, his executors, administrators, and assigns, from thenceforth for remainder of said term of ninety-nine years.

SUBJECT to right of redemption by said Head.

COVENANT by said Taylor, that he had done no act to incumber.

EXECUTED and attested.

RECEIPT for consideration signed and attested.

Nov. 7, 1859. BY INDENTURE OF ASSIGNMENT, BETWEEN said Balls, of the first part; said Head, of the second part; and John Parsons, of the third part;

RECITING the before abstracted indentures of lease and mortgage, and the before abstracted deed poll;

RECITING, that the principal sum of £1500 was then owing to said Balls, together with £82 14*s.* 9*d.* for the interest thereof;

IT WAS WITNESSED, that in consideration of £1582 14*s.* 9*d.* to said Balls paid by said Parsons, (by the direction and appointment of said Head, testified, &c.), AND also in consideration of £317 5*s.* 3*d.* to said Head paid by said Parsons and Balls, (by the direction and appointment of said Head, testified as aforesaid), Balls did bargain, sell, assign, and set over, and said Head

Nov. 7, 1859. did fully and absolutely bargain, sell, assign, set over, release, ratify and confirm unto said Parsons, his executors, administrators, and assigns, as well

THE said Premises;

AND all the estate, &c.:

TO HOLD with their and every of their appurtenances, unto said Parsons, his executors, administrators, and assigns, from thenceforth for the remainder of the said term of ninety-nine years.

COVENANT by said Balls, that he had done no act to incumber.

COVENANTS by said Head that lease was valid; that said Balls and Head, or one of them, had full power to assign; for quiet enjoyment, free from incumbrances;

AND for further assurance.

EXECUTED by said Balls and Head and attested.

RECEIPTS for respective considerations indorsed.

April 2, 1876. BY WILL of this date said John Parsons gave and bequeathed All his real and personal estate in the following words, namely:—

"ALL my lands, tenements, hereditaments, and real estate whatsoever and wheresoever (including leaseholds), which I am seised or entitled unto, and all my moneys, stocks, funds, and securities, and other personal estate whatsoever."

UNTO Henry Thomas and Richard Goodchild, their heirs, executors, administrators, and assigns, upon the trusts and for the intents and purposes following, viz.:—

UPON TRUST as soon as conveniently might be after his said testator's decease, to call in and enforce payment of all debts, sum and sums of money which should be due to him upon mortgage or other security, and also to sell and convert into money all such other parts of his estate and effects as should not then consist of money in any manner they should deem most expedient and for the most money that they could obtain for the same, or as should to them seem most reasonable.

AND as to the moneys to be so, or in any other manner received under or by virtue of the now abstracting will,

UPON TRUST, to pay his said testator's debts, funeral, and testamentary expenses, and the pecuniary legacies thereinafter mentioned, and after payment thereof

April 2, 1876. Upon trust, to lay out and invest the surplus in their or his own name or names in the parliamentary stocks or funds of Great Britain, or upon real securities at interest, with power to vary and transpose the same from time to time as often as they or he should think fit, and to pay the interest, dividends and annual produce thereof to his wife, said Jane Parsons, during her life, and after her decease upon the trusts therein mentioned.

And the testator declared that his said trustees or trustee might postpone the sale and conversion of his real and personal estate, or any part thereof, as long as they should think fit, but that his real estate should be considered and treated as personalty, and that until such sale and conversion, his said trustees or trustee should pay and apply the rents, profits, and annual income of his real and personal estate, or of so much thereof as should for the time being remain unsold or unconverted, upon the trusts and for the purposes by his said will declared of and concerning the interest, dividends, and annual income of the proceeds of such sale and conversion as thereinbefore mentioned.

And the testator appointed said Henry Thomas and Richard Goodchild, and his wife, said Jane Parsons, executors of his said will.

Executed in the presence of, and attested by two witnesses.

Oct. 20, 1879. The said John Parsons died.

Dec. 3, 1879. The will of the said John Parsons was proved by said Henry Thomas, Richard Goodchild, and Jane Parsons, the executors and executrix thereof, in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice.

Arrangement of margins.

Note.—In preparing Abstracts the following is the order which is generally adopted with regard to the arrangement of clauses of documents, &c., in the several margins:—

1*st Margin.* The dates of events and of documents abstracted.

2*nd Margin.* Names and descriptions of parties, witnessing parts, powers, provisoes, agreements, covenants, conditions, headings relating to different parts of a property, acts of parliament, decrees and orders of the courts, reports and certificates of masters, chief clerks, &c., certificates generally, statements of fact, and all other matters not assigned to the inner margins.

3*rd Margin.* The recitals, habendums.

4*th Margin.* Uses, trusts.

5*th Margin.* Parcels, estate clauses, general words, exceptions and reservations, execution and attestation of documents, probates of wills.

Many practitioners, however, put covenants in the 4th margin (if long), or in a 6th margin (if short), and general words also in the 6th margin. (Moore on Abstracts, p. 78.)

ACKNOWLEDGMENTS.

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I.—Of Acknowledgment by Married Women and their Powers of Disposition, inter vivos.

In the course of the following remarks on Acknowledgments by Married Women, it will be convenient

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to say something on the subject of the powers of disposition possessed by married women *inter vivos*, and to refer the reader to this place whenever any question as to those powers occurs in this work.

Real estate.

The powers of disposition granted to married women by the common law are exceedingly limited. A wife's real estate is held by her husband in her right during the marriage, and he alone can dispose of the rents and profits of it: Bac. Abr. tit. Baron and Feme (C.), 1. He is also entitled to his estate by the curtesy, in case of issue born of the marriage, for the rest of his life if he survive his wife: Co. Litt. 29 a. It is only her reversionary real estate, beyond the estate for life, and subject to the estate by the curtesy, of which she can dispose at all, and this not without the concurrence of her husband. But to protect the wife from his undue influence the law did not allow her to dispose of her reversionary real estate until it had been ascertained that she did so voluntarily. This was formerly done by means of a fine or recovery, Bac. Abr. tit. Fines; but, since 3 & 4 Will. 4, c. 74, by acknowledgment. The object of acknowledgment, like that of the fine and recovery, is to protect the wife against the husband's influence. His concurrence is rendered necessary for the protection of himself and his heirs. See *Goodchild* v. *Dougal*, 3 Ch. D. 650. The court accordingly will not supply the want of an acknowledgment by a married woman, as to do so would be to deprive her of the protection afforded her by law: *Lassence* v. *Tierney*, 1 M. & G. 554; 14 Jur. 182. But where an order has been obtained under sect. 91 of the Fines and Recoveries Act (set out below, p. 241), dispensing with the husband's concurrence, a conveyance by the wife without acknowledgment is valid: *Goodchild* v. *Dougal*, *ubi supra*. The wife of a convict or man who has abjured the realm may act as if her husband were dead: Co. Litt. 132; see also *Ex parte Franks*, 7 Bing. 762. By custom of the city of London and some other places a married woman, on being privately examined before the mayor, may bind herself by deed acknowledged and enrolled according to the custom of the city or borough:

Acknowledgment dispensed with.

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4 Cruise Dig. tit. xxxii. ch. 2, pl. 33. Where an Act of Parliament authorizes the purchase of land in which a *feme covert* is interested, and gives the court authority to distribute the purchase-money, the exercise of that power is in lieu of acknowledgment: *Ex parte Ellison*, 2 Y. & C. 528. But the statute 16 & 17 Vict. c. 70, does not enable the Lord Chancellor to direct the committee of a lunatic married woman to convey real estate, which if sane she could only dispose of by acknowledgment: *Re Stables*, 12 W. R. 513. A married woman can elect so as to affect her interest in real estate without acknowledgment, and where she has so elected the court can order a conveyance accordingly: *Barrow* v. *Barrow*, 4 K. & J. 409; 4 Jur., N. S. 1049: *Smith* v. *Lucas*, 18 C. D. 531.

What property acknowledgment will pass.

By statute 8 & 9 Vict. c. 106, s. 7, a married woman can disclaim (*a*) by acknowledgment, and, by sect. 7, her contingent interest in realty may be disposed of in like manner. It seems that a married woman might have disposed of such an interest by acknowledgment before the passing of the last-named Act, although neither a man nor a *feme sole* could before it dispose of such interest: *Crofts* v. *Middleton*, 8 De G., M. & G. 192; 2 Jur., N. S. 528; 23 L. J., Ch. 513. The combined force of sects. 1 and 77 of the Fines and Recoveries Act, enables the married woman to dispose of nearly every interest connected with land. The definition of "estate" in sect. 1 is as follows: "the word 'estate' shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien, or incumbrance in, upon or affecting money subject to be invested in the purchase of lands." Where real estate was devised upon trust for sale, and to pay the proceeds to a married woman, it was held she could dispose of it under this Act: *Briggs* v. *Chamberlain*, 11 Hare, 67. And where personalty has been invested in real estate in breach of trust, a married woman can dispose of it by acknowledgment: *Durrant* v. *Stoner*

(*a*) The Irish statute contains the word "disclaim": 4 & 5 Will. 4, c. 92, s. 68.

(C. A.), 18 Ch. D. 106. But where the married woman has only a share in the distribution, and the legal estate is in the trustees, she cannot be bound by acknowledgment: *Franks* v. *Bollans*, L. R., 3 Ch. 717; *Re Newton*, 23 Ch. D. 181. Acknowledgment by Married Women.

By sect. 40 of the Fines and Recoveries Act it is, *inter alia*, provided that: Estate tail.

"If the tenant in tail making the disposition shall be a married woman the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowleged by her as hereinafter directed" (*b*). 3 & 4 Will. 4, c. 74, s. 40.

By 4 & 5 Vict. c. 38, s. 5, which provides for donations of sites for schools, it is enacted that: Sites for schools.

"Where any married woman shall be seised or possessed of or entitled to any estate or interest, manorial or otherwise, in land proposed to be conveyed for the purposes of this Act, she and her husband may convey the same for such purposes by deed without any acknowledgment thereof."

There seems to be no doubt that it was intended to empower women, married before 1834, to bar their dower by this statute, though in framing the section the right of dower is not scientifically provided for: Sugden's Real Property Statutes, 2nd ed. 234; *Dent* v. *Clayton*, 12 W. R. 903. Dower.

Copyholds to which the husband is entitled in right of his wife at law are not within the Act (see sect. 77). On surrender the wife is examined according to the custom of the manor: *Driver* d. *Perry* v. *Thompson*, 4 Taunt. 293; *Doe* d. *Shelton* v. *Shelton*, 3 Ad. & E. 265. Equitable estates in copyholds are provided for by sect. 90. Copyholds.

If for any reason it is not convenient to comply with the conditions of the Settled Estates Act, 1877, Leases.

(*b*) As to disentailing deeds generally, see *post*, Art. DISENTAILING DEEDS. A married woman, tenant in tail, executed, with the concurrence of her husband, a disentailing deed, which was enrolled under the Act within six months, but was not acknowledged by her till long afterwards. Held, that acknowledgment need not precede the enrolment, and that the deed was effectual: *Ex parte Taverner*, 7 D., M. & G. 627; 1 Jur., N. S. 1194.

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s. 46 (*c*), leases can be made by acknowledged deed. Where the lease was not acknowledged, and did not comply with the Settled Estates Act, but the wife had acquiesced in it after the husband's death, her executors were bound: *Toler* v. *Slater*, 3 Q. B. 42. The Settled Estates Act, 1877, gives no power to married women except under the supervision of the Court; but her husband has power under that Act to lease his wife's estates settled or otherwise. See sect. 46 of that Act.

Whether deeds in exercise of statutory powers require acknowledgment.

Stat. 45 & 46 Vict. c. 38.

It seems doubtful whether, under sect. 61 of the Settled Land Act (*vide post*, sub tit. SETTLEMENTS), a married woman, tenant for life, not entitled to her separate use, can exercise the powers conferred upon her by the Act without acknowledgment. This is a very important question for the purchaser. It may be said that, in the absence of any statutory exception from the general rule, a married woman and her husband cannot convey except by acknowledgment. But it should be considered that the powers conferred upon the married woman are entirely statutory and artificial; that no protection from her husband is required for the purchase-money, which must be invested under the Act; that married women can exercise powers of appointment without acknowledgment when the power does not forbid it; and, finally, that the 5th sub-section gives her power to execute, make, and do all deeds, instruments and things necessary or proper for giving effect to the provisions of the section. Mr. Wolstenholme is of opinion (Settled Land Act, p. 68) that acknowledgment is unnecessary under the section; but, with all deference to his great authority, it is conceived that, until there is a judicial decision on the point, a purchaser could not safely accept an unacknowledged deed from the married woman vendor and her husband.

Chattels real.

The wife's chattels real do not either at law or in equity vest in the husband absolutely, but on his death, her chattels real, if undisposed of by him during the coverture, survive to her. The husband cannot therefore dispose of them by his will, but during

(*c*) The question of leases under statutory powers will be fully considered in a subsequent volume of this work, sub-tit. LEASES.

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coverture he is entitled to the rents and profits, and can surrender them in deed or in law, and otherwise dispose of them *inter vivos*, and they are liable to execution for his debts: Co. Lit. 46 b, 351 a, n. 1; Bac. Abr. tit. Baron and Feme (C.), 2; *Donne* v. *Hart*, 2 Russ. & My. 360. But the husband is only entitled to deal with such chattels real as could by possibility vest during the coverture, including contingent interests: *Duberly* v. *Day*, 16 Bea. 33; *Donne* v. *Hart*, 2 Russ. & My. 360. On the death of the wife in his lifetime, the husband becomes entitled to her chattels real, whether settled to her separate use or not. If they were vested in him during marriage, he is entitled to them in his marital right, otherwise as administrator to his wife: Wms. on Exors., 8th ed., p. 701.

Rights of the husband in the wife's personal property.

At common law all the chattels personal of the wife belonging to her at the time of her marriage, or falling into possession during the coverture, became absolutely the property of the husband: Co Litt. 300 a; Bac. Abr. tit. Baron and Feme (C.) 3. He might dispose of them by deed or otherwise in his lifetime, or by his will. They were subject to his debts, and in case of his intestacy, they would form part of his general personal estate out of which his widow would merely be entitled to a distributive share, as she would be out of property which had originally been her husband's.

Choses in action.

The husband was also entitled to all the wife's choses in action whether legal, *e.g.*, debts secured by bonds or promissory notes; or equitable, such as legacies and residuary interests under settlements: provided he would reduce them into possession during the coverture. Otherwise, if he survived her, he or his legal personal representatives after his death, on taking out administration of the wife's estate, were entitled to possession of them absolutely after payment of her debts: Stat. 29 Car. 2, c. 3, s. 25. But if she survived him, and the choses in action had not been reduced into possession, she was entitled to them: Co. Litt. 351 b. And therefore, before Malins' Act (20 & 21 Vict. c. 57), set out below, p. 249, neither the husband, the wife, nor the

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husband and wife together, could dispose of the wife's reversionary personal property: *Purdew* v. *Jackson*, 1 Russ. 1; *Honner* v. *Morton*, 3 Russ. 65. It seems doubtful whether the wife can bind her reversionary personal property by election: compare *Wall* v. *Wall*, 15 Sim. 513, with *Williams* v. *Mayne*, I. R., 1 Eq. 519; and *Smith* v. *Lucas*, 18 Ch. D. 531. Where the wife had a life estate not settled to her separate use, it could only be disposed of under the Act: *Stiffe* v. *Everitt*, 1 M. & C. 37; *Harley* v. *Harley*, 10 Hare, 325; *In re Godfrey's Trusts*, L. R., 1 Eq. 531; but see *Fitzgerald* v. *Fitzgerald*, L. R., 2 P. C. 83, where *Hore* v. *Becker*, 12 Sim. 465, was disapproved. A married woman cannot, by obtaining the assignment of all other interests in the property, gain a disposing power over it, for equity will not allow it to merge for the purpose of defeating the object of the restriction: *Whittle* v. *Henning* (on appeal), 2 Ph. 731. The scope of the 20 & 21 Vict. c. 57 (Malins' Act), is very limited. No disposition can be made under it unless the reversionary property is held under an instrument made after the 31st December, 1857, so that reversionary property coming to a married woman on intestacy is not within the Act. No disposition can be made of property to which the married woman is entitled under her marriage settlement; nor if the married woman is restrained from alienating such interest by the instrument creating it (*d*).

But the husband's rights in his wife's equitable choses in action are subject to her equity to a settlement, as to which see below, p. 217.

(*d*) The report of the case of *Clarke* v. *Green* (2 H. & M. 474), is unsatisfactory. It does not appear that V.-C. *Wood's* attention was called to the words of the Act. In that case a married woman, being entitled to a reversion under the will of a testator who died in 1835, made a settlement of it on herself, with a proviso that the husband, if he survived, should become absolutely entitled. The question appears to have been raised whether the married woman could dispose of her right of survivorship. But it is submitted that whether such right accrued to her under the marriage settlement, or under the will, she could not dispose of it under the Act; for the will was an instrument made before the date of the Act.

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But the difficulties which the common law placed in the way of a married woman's power of disposition were got over in two ways :—(1) By means of powers; (2) by the creation of a separate estate for her, independent of her husband's debts, control, and engagements.

Powers.

1. A married woman, unless forbidden by the terms of the power, may exercise a power without the concurrence of her husband : Sugd. Powers, 8th ed. 153. A married woman infant may exercise a power of appointment by deed : *Re D'Angibau, Andrews* v. *Andrews* (C. A.), 15 Ch. D. 228. Where a power was given to a *feme sole* followed by trusts for the benefit of herself and any future husband, it was held that she might validly exercise the power during marriage : *Wood* v. *Wood*, L. R., 10 Eq. 220. The creation and exercise of powers will be treated of below, under tit. POWERS. A married woman may release or extinguish any power which may be vested in, or limited or reserved to her in regard to any lands of any tenure, or money subject to be invested in the purchase of lands, see stat. 3 & 4 Will. 4, c. 74, s. 77, and also of any reversionary personal estate, stat. 20 & 21 Vict. c. 57, s. 1, as effectually as if she were a *feme sole*. Before the Conveyancing Act, 1881, s. 52, a collateral power could not be extinguished or released, nor before the Conveyancing Act, 1882, s. 6, could a power be disclaimed. It is submitted that the Acts give a married woman no power to do either except by acknowledged deed. See *Rex* v. *Harrold*, L. R., 7 Q. B. 361 ; *Chorley* v. *Lings*, L. R., 4 C. P. 374.

The wife may acquire separate property : (1) By declaration of trust.

2. The wife may acquire separate property in various ways :—(1) By declaration of trust. A trust for the "sole and separate use," or "solely for her own use," or "solely and entirely for her own use and benefit," or "for her own benefit independent of any other person," are sufficient to create such a trust. The best form is upon trust for C. (or simply to C.) "for her separate use" (*e*). Whether the trust

(*e*) For other forms held good and otherwise, see Lewin on Trusts, 7th ed., p. 644 *et seq.* In instruments (other than settlements, *infra*, p. 226), made since the Act, see below, p. 226 n. (*i*),

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be created in favour of a *feme sole* or of a *feme covert* it will take effect on every subsequent marriage (*Tullett* v. *Armstrong*, 4 M. & C. 390; 1 Bea. 1); unless it is expressly confined to a particular marriage, or a particular marriage is excluded. See the cases in Lewin, 7th ed., 646, and *King* v. *Lucas* (C. A.), 23 Ch. D. 712. But a woman, while she is discovert, can destroy the separate use. Thus, money in the funds was given to an unmarried woman for her separate use without any trustee being interposed. While still single she sold it out, spent some, and invested the rest in an unlimited bank, and then married. *Wood*, V.-C., held that the separate use had been destroyed, and did not take effect on the marriage: *Wright* v. *Wright*, 2 J. & H. 647.

(2) By dealings with husband.

(2) By dealings with her husband after marriage. The wife can contract with her husband in respect of her separate estate, and in respect of any interest in property in which she has any interest independent of him, such as her reversionary, real, and personal property, or her dower (*f*). But in the case of real property and reversionary personal property not given to her separate use the wife cannot contract without acknowledgment: *Pride* v. *Bubb*, L. R., 7 Ch. 64; *Cahill* v. *Cahill*, 8 App. Cas. 420. It was, until lately, very generally supposed that, in certain cases where the husband and wife were "at arm's length," she could bind such property by contract with him without acknowledged deed. But this was held to be bad law in the recent case of *Cahill* v. *Cahill*, *ubi supra*, where the whole question is fully discussed.

Conveyance between husband and wife.

By the Conveyancing Act, 1881, s. 50, it is enacted that:

(1) "Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife,

property given to a married woman will become her separate property without the use of any such words.

(*f*) See Married Women's Property Act, 1882, ss. 2 and 5, set out below, p. 225.

and by a wife to her husband, alone or jointly with another person."

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(2) "This section applies only to conveyances made after the commencement of this Act" (Jan. 1st, 1882).

A husband can before or after marriage acquiesce in his wife's carrying on a separate business, in which case she has complete disposing power over the business and stock in trade, subject to the rights of the husband's creditors in case there was no valuable consideration given for the husband's acquiescence: *Ashworth* v. *Outram* (C. A.), 5 Ch. D. 923; see also Rop. Hus. and W. vol. 2, p. 165.

Separate trade.

(3) By her equity to a settlement. This right arose from the rule that he who seeks equity must do equity, and on this principle the Court of Chancery stipulated as a price for its assistance, that the husband seeking to recover his wife's equitable choses in action should, out of the property recovered, make a provision for his wife and children: 1 Rop. H. and W. 257. See also *Milner* v. *Colmer*, 2 P. Wms. 639; *Sturgis* v. *Champneys*, 5 My. & Cr. 197. This right of the wife originally seems to have extended only to cases in which the husband, or persons claiming under him, were plaintiffs. See *Bosvil* v. *Brander*, 1 P. Wms. 458. But the leading case of *Lady Elibank* v. *Montolieu* (5 Ves. 737) established the rule that a wife might come into court to assert her right to a settlement of property reduced into possession during the coverture by her husband. See also *Duncombe* v. *Greenacre*, 2 De G., F. & J. 509; *S. C.*, 9 Jur., N. S. 175; *Giacometti* v. *Prodgers*, L. R., 8 Ch. 338; *Ruffles* v. *Alston*, L. R., 19 Eq. 539. The right extends so as to bind the husband's assigns for valuable consideration, *Macaulay* v. *Philips*, 4 Ves. 15; and is enforceable even in case of his insolvency or bankruptcy: *Burdon* v. *Dean*, 2 Ves. jun. 607; *Oswell* v. *Propert*, *ibid.* 680; *Sturgis* v. *Champneys*, 5 My. & Cr. 97. The right, however, will not prevail against an assignee for value of the wife's equitable life interest, *Tidd* v. *Lister*, 3 De G., M. & G. 857; *Durham* v. *Crackles*, 8 Jur., N. S. 1174; nor against her

(3) Equity to a settlement.

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creditors in respect of debts incurred before marriage: *Barnard* v. *Ford*, L. R., 4 Ch. 247.

To what property the right attaches.

This doctrine of the equity to a settlement was applied by the Court of Chancery to all kinds of property which by any means became subject to its jurisdiction. The right has consequently been held to attach, not only to personal property vested in trustees for the benefit of a married woman, but also to her equitable interest in real estate: *Wortham* v. *Pemberton*, 1 De G. & S. 644; *Barnes* v. *Robinson*, 11 W. R. 276; *S. C.*, 9 Jur., N. S. 245; and chattels real: *Hanson* v. *Keating*, 4 Ha. 1. In *Sturgis* v. *Champneys* (*ubi supra*), the assignee of an insolvent debtor, whose wife was entitled for life to real property, being obliged to come into equity to enforce his title to the rents and profits during the joint lives of the husband and wife, in consequence of the legal estate being outstanding in mortgagees, it was held that the assignee was bound to make a provision for the wife out of the rents and profits. In the case of *Gleaves* v. *Paine*, 1 De G., J. & S. at p. 93, Lord *Westbury*, C., remarked, that although the decision in *Sturgis* v. *Champneys*, being a decision of a Lord Chancellor, must be followed, having been established so long, he was not disposed to extend it any further than the actual decision went, and that, as in that case the assignees were plaintiffs, it would extend the rule very much to recognise the doctrine that a wife might come into court asking a settlement of real estate belonging to the husband against the husband's assignee, which the assignee could render available without resorting to a court of equity. A married woman has the same equity to a settlement in respect to a life interest as in respect of property to which she is absolutely entitled: *Wilkinson* v. *Charlesworth*, 10 Beav. 324; *Taunton* v. *Morris* (C. A.), 11 Ch. D. 779; but the right will not attach to arrears of past income of real or leasehold property which the husband has assigned to a particular assignee: *Re Carr*, L. R., 12 Eq. 609; nor to property for the recovery of which the husband alone has the right to sue: *Brooke* v. *Hickes*, 12 W. R. 703; nor to property in which the

husband and wife have a joint interest: *Ward* v. *Ward*, 14 Ch. D. 506; *Re Bryan, Godfrey* v. *Bryan*, 14 Ch. D. 516.

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The right of a married woman to a settlement includes all property to which she becomes entitled, whether it vest in her before or after marriage: *Barrow* v. *Barrow*, 18 Beav. 529; and is enforceable as soon as the property in respect of which she claims the right is actually in possession, although not actually distributable: *Re Robinson's Settled Estate*, 12 Ch. D. 188.

As to the amount of the wife's property to be settled.

The court will not generally require the whole of the wife's fortune to be settled, but only a reasonable portion thereof: *Beresford* v. *Hobson*, 1 Madd. 362. The ordinary rule is that one-half of the fund will be ordered to be settled, and the other half will be allowed to go to the husband or his assigns: *Jewson* v. *Moulson*, 2 Atk. 417; *Brown* v. *Clark*, 3 Ves. 166; *Spirett* v. *Willows*, L. R., 1 Ch. 520. But the court will take into account the special circumstances of each particular case, and having regard to any settlement previously made, as to the amount of property of the wife already received by the husband, or to his conduct and position in life, will order such proportion as may seem proper to be settled: *Green* v. *Otte*, 1 Sim. & St. 250; *Conington* v. *Gilliatt*, 25 W. R. 69; *Re Suggitt's Trusts*, L. R., 3 Ch. 215. So where a husband had separated from his wife without sufficient cause and without having made adequate provision for her and her children, three-fourths of property bequeathed to the wife was ordered to be settled for their benefit, and the remaining fourth to be paid to the husband: *Coster* v. *Coster*, 9 Sim. 597. See also *Walker* v. *Drury*, 17 Beav. 482. And the Court has ordered the whole fund to be settled where it was very small: *Re Kincaid's Trusts*, 16 Jur. 106; *S. C.*, 1 Dr. 326; *Re Hooper's Trusts*, 6 W. R. 824. Where the husband was insolvent, and there was no previous settlement: *Francis* v. *Brooking*, 19 Beav. 347; *Re Cordwell's Estate*, L. R., 20 Eq. 644; *Taunton* v. *Morris* (C. A.), 11 Ch. D. 779. See also *Duncombe* v. *Greenacre*, 29 Beav. 578. And where the husband has

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been guilty of gross misconduct: *Dunkley* v. *Dunkley*, 2 De G., M. & G. 390; *Barrow* v. *Barrow*, 5 De G., M. & G. 782; *Re Ford*, 32 Beav. 621.

Form of settlement.

The form of settlement proper to be adopted where the wife claims her equity was very fully discussed in *Spirett* v. *Willows*, L. R., 4 Ch. 407. In that case the trusts were declared to be for the wife for life, for her separate use, with a restraint on anticipation, with remainder for her issue as she should appoint (*Oliver* v. *Oliver*, 10 Ch. D. 765); and in default of appointment for all her children, or any her child, who, being sons or a son, should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry (*Gent* v. *Harris*, 10 Ha. 383; *Francis* v. *Brooking*, 19 Beav. 347); if any child should die in the wife's lifetime, having issue, such issue were to take, *per stirpes*, the share of the deceased child; the settlement contained the usual hotchpot, advancement, maintenance, and accumulation clauses, the power of advancement to be exercisable during the lifetime of the wife, with her consent in writing; the ultimate trust was in favour of the plaintiff, as assignee in bankruptcy of the husband. See also *Croxton* v. *May*, L. R., 9 Eq. 404; and *Walsh* v. *Wason*, L. R., 8 Ch. 482, where it was distinctly laid down that the ultimate trust will be in favour of the husband whether he survives the wife or not. See further, on the subject of the equity of married women to a settlement, Seton, Vol. II., Part I., pp. 672—680; 1 Dan. Ch. Pr. 121—137; and the notes to *Murray* v. *Lord Elibank*, 1 Wh. & Tud. L. C., Eq. 471 *et seq.*

Waiver of equity.

But the wife may wave her equity to a settlement by examination in court: *Beaumont* v. *Carter*, 32 Beav. 586; or by commission issuing from the Court: *Tasburgh's Case*, 1 V. & B. 507; and if the property has been made over to the husband before the action brought, the wife's equity is gone: *Murray* v. *Lord Elibank*, *ubi supra*. And under 20 & 21 Vict. c. 57, s. 1 (set out below, p. 249), the wife may at any time, whether before or after the property has fallen into possession, release or extinguish her equity by acknowledged deed.

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(4.) The savings which a married woman makes out of her separate property, and the investments of them, including land, belong to her for her separate use: *Gore* v. *Knight*, 2 Vern. 535; *Muggeridge* v. *Stanton*, 1 D., F. & J. 107; *Duncan* v. *Cashin*, L. R., 10 C. P. 554; *Engelback* v. *Nixon*, *ib.* 645: *Hughes* v. *Wells*, 9 Hare, 749.

Savings.

(5.) Separate property conferred on the married woman by statute.

Stat. 20 & 21 Vict. c. 85.

By 20 & 21 Vict. c. 85 (the Divorce Act, 1857), a wife deserted by her husband, and obtaining a protection order under sect. 21, is, as from the date of and during such desertion, placed "in the like position in all respects with regard to property and contracts, and suing and being sued," as she would be under that Act if she had obtained a decree of judicial separation. By sects. 25 and 26 it is enacted that—

In case of judicial separation the wife to be considered a *feme sole* with respect to property she may acquire, &c.

Sect. 25. "In every case of a judicial separation, the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had then been dead: provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate."

Also for purposes of contract and suing.

Sect. 26. "In every case of a judicial separation, the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband."

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And the Divorce Act, 1858, enacts that:

Stat. 21 & 22 Vict. c. 108.

Provisions respecting property of wife to extend to property vested in her as executrix, &c.

Sect. 7. "The provision contained in this Act, and in the said Act 20 & 21 Vict. c. 85, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become or shall become entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix."

Order for protection of earnings, &c., of wife to be deemed valid.

Sect. 8. "In every case in which a wife shall under this Act, or under the said Act 20 & 21 Vict. c. 85, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation, or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had, in case the same had not been so reversed, varied, or discharged in respect of any debts, contracts, or acts of the wife incurred, and entered into, or done between the times of the making such order or decree, and of the discharge, variation, or reversal thereof; and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be) shall be deemed to be included in the protection given by the order or decree."

Order to state time at which the desertion commenced.

Sect. 9. "Every order which shall be obtained by a wife under the said Act 20 & 21 Vict. c. 85, or under this Act, for the protection of her earnings or property, shall state the time at which the desertion in consequence whereof the order is made commenced; and the order shall, as regards all persons dealing with such wife in reliance thereon, be conclusive as to the time when such desertion commenced."

Indemnity to corporations, &c., making payments under orders afterwards reversed.

Sect. 10. "All persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to or permit any transfer or act to be made or done by the wife who has obtained the same, shall, notwithstanding such order or decree may then have been discharged, reversed, or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if, at the time of such payment, transfer, or other act, such order or decree were valid and still subsisting without

variation in full force and effect, and the separation of the wife from her husband had not ceased or been discontinued, unless at the time of such payment, transfer, or other act such persons or corporations had notice of the discharge, reversal, or variation of such order or decree, or of the cessation or discontinuance of such separation."

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By the Matrimonial Causes Act, 1878, s. 4, it is provided that—

Stat. 41 & 42 Vict. c. 19.

"If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of 24 & 25 Vict. c. 100, s. 43, upon his wife, the court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty."

Aggravated assault.

Not many questions seem to arise on these Acts, which in future will cease to be necessary for the purpose of protecting the property of the wife. The first Act was held to apply to trusts even before the second was passed: *Bathe* v. *Bank of England*, 4 K. & J. 564.

The general effect of the Acts is as follows:—(1) A woman divorced from her husband holds her property from the date of the decree nisi: *Prole* v. *Soady*, L. R., 3 Ch. 220; as if he had died at the date of decree: *Wells* v. *Malbon*, 31 Beav. 48. (2) A woman who is judicially separated from her husband, or who has obtained a protection order, holds her property from the date of sentence or the desertion, as a *feme sole*, and persons dealing with her are protected from any reversal of the sentence or order. As to the wife's choses in action it may be said generally that, if the husband has not, for whatever reason, reduced them into possession before the date of decree, sentence, or desertion, as the case may be, they remain the property of the wife, and she can sue for them in her own name under the Acts: *Coward and Adams' Purchase* (*Jessel*, M. R.), 20 Eq. 179; *Nicholson* v. *Drury, &c.*, 7 Ch. D. 48. The best test of reduction into possession is thus given by *Fry*, J., in that case: "Nothing has ever been held to amount to reduction into possession of

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a wife's chose in action which does not give the husband for some moment of time absolute dominion over the property without any concurrence of the wife:" p. 55. So her reversions at the date of decree, sentence, or desertion falling in afterwards are her separate property: *Re Insole*, 1 Eq. 470. And the defect of a disposition between the date of desertion and obtaining the order or decree nisi and the decree absolute is cured by the subsequent order or decree: *In the Goods of Ann Elliott*, L. R., 2 P. & M. 274. The decree, sentence, or order, discharges any restraint on anticipation. *Cooke* v. *Fuller*, 26 Beav. 99; *Munt* v. *Glynes*, 20 W. R. 823; 41 L. J., Ch. 639.

Stat. 33 & 34 Vict. c. 93.

(b) The Married Women's Property Act, 1870, enacts that—

Personal property not exceeding 200*l.* coming to a married woman to be her own (*g*).

Sect. 7. "Where any woman married after the passing of this Act shall during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same."

Freehold property coming to a married woman, rents and profits only to be her own (*g*).

Sect. 8. "Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same."

"Entitled" in sect. 7 means entitled in possession: *Lane* v. *Oakes*, 22 W. R. 709; 30 L. T. 726; and in that case a reversionary fund which belonged to a married woman before marriage and fell into possession afterwards, was held to be her separate property.

It has been held by *Jessel*, M. R., in *King* v. *Voss*, 13 Ch. D. 504, that any personal estate, whatever its nature or value, is within sect. 7.

The same eminent judge expressed an opinion in *King* v. *Voss*, *ubi supra*, that the words "rents and

(*g*) Inaccurate, see text.

profits" carried the fee to the married woman s separate use; but the expression is enough to exclude trust property. Leaseholds are not within either section, unless they are part of an intestate's estate. It is not impossible that it might be held that real estate within the Act descending to a *feme sole* would be her separate property if she subsequently married: Dart, V. & P. 5th ed. p. 21. Otherwise it would follow that if a woman acquiring property under these sections became discovert and then re-married before the Act of 1882, that the separate use was gone.

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The Married Women's Property Act, 1882, enacts as follows—

Stat. 45 & 46 Vict. c. 75.

Sect. 1.—"(1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."

Married woman to be capable of holding property and of contracting as a *feme sole*.

"(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract" [*the rest of the sub-section refers to suing*].

"(3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown."

"(4) Every contract entered into by a married woman, with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

Sect. 2. "Every woman who marries after the commencement (*h*) of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Property of a woman married after the Act to be held by her as a *feme sole*.

(*h*) By sect. 25, the date of the commencement of the Act is the 1st of January, 1883. An Act commences from the first moment of the day of its commencement: *Tomlinson* v. *Bullock*, 4 Q. B. D. 230.

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Sect. 5. "Every woman married before the commencement (*h*) of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement (*h*) of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid."

Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

Saving of existing settlements and the power to make future settlements.

Sect. 19. "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman (*i*); or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

The effect of these provisions and the Act generally is to create a new status for married women,

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(*h*) See note (*h*), *ante*, p. 225.

(*i*) A marriage settlement made in 1862, contained an agreement to settle after-acquired property of the wife (other than interests settled and limited to her separate use). Under the will of a testator who died in 1883, she became absolutely entitled to a sum of money not limited to her separate use: it was held that the bequest to the wife came within the covenant to settle after-acquired property: *Re Stonor's Trusts*, 24 Ch. D. 195. And it would seem to follow from this decision that a trust for the separate use of a married woman is still as necessary as before the Act in any instrument which might by possibility come within the term "settlement." See the judgment of *Pearson*, J., at p. 198. In any case it is conceived that it would be rash to omit such a trust in framing a settlement by deed or will, until the necessity for inserting it is dispensed with by express judicial decision. Conveyancers cannot be too much on their guard against forming an exaggerated estimate as to charges introduced by recent legislation as regards drafting. The present Editor recently had before him a reconveyance of a mortgage in fee, in which the draftsman had evidently assumed that the Conveyancing and Law of Property Act, 1881, repealed the Statute of Uses.

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and to introduce instead of the old equitable use a statutory separate property at law, as to which the married woman has all the powers of a *feme sole* (*j*). It will be observed that the wording of the 2nd section is exceedingly like that of the Divorce Act. But no question will arise under it as to reversions or choses in action, because in any case they must either belong to the married woman before marriage or be acquired by or devolve upon her afterwards, and so come within the section.

Reversions under sect. 5.

The interpretation of the 5th section is much more difficult. The wording of the section might lead the reader at first sight to suppose that remainders and reversions, which were vested in the wife before the commencement of the Act, and which fell into possession afterwards, are within the section and belong to the wife. But this is not the case. The wording is not the same as that of the Divorce Act, or that of the 2nd section above. A title can only be said to accrue once, and in case of reversionary property the title, though not the possession, accrues when the reversion first arises, and not when it becomes vested or falls into possession. Thus, *In re Pedder's Trusts*, L. R., 10 Eq. 585, where the wife had a vested remainder before

(*j*) It has been held that, as a result of this Act, that when there is a bequest to a husband and wife and to a third person, the husband and wife, instead of taking only a moiety as one person in law, now take each one-third share; the wife's share being her separate property under the Act: *Re Marsh, Mander* v. *Harris*, 24 Ch. D. 222. Another important result of this Act appears to be that a married woman, as regards property to which she is entitled as a *feme sole*, will be on the same footing as if she had no husband living; and consequently, in case of her death intestate, her husband will take no interest in her realty as tenant by the curtesy, but her heir-at-law will take directly, and immediately after her death. It must be borne in mind, as bearing on this question, that the title of the husband as tenant of the curtesy accrues, if at all, during his wife's life upon the birth alive of issue of the marriage, and only becomes complete on her death. See Co. Litt. 29 b., and Hargreave's Notes. It has further been suggested that her personalty will go among her next of kin to the exclusion of the husband (see Wolst. Conv. Acts, p. 9); but it is difficult to believe that this can have been the intention of the legislature. Both questions must, however, before long, be settled by judicial decision.

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marriage, and died before it fell into possession, *James*, V.-C., held that no title had accrued during the marriage (*k*). If this is correct, one curious effect of the wording of the section is that a woman entitled in expectancy to a reversion in personalty, under sect. 7 of the Act of 1870 (which would not be her separate property until it fell into possession, *Lane* v. *Oakes*, 22 W. R. 709; 30 L. T. 726) will not be entitled to it under the 5th section of this Act, because the title accrued before the passing of the Act.

Another effect will be that if a woman married before the Act, was, at the time of marriage, possessed of a vested remainder liable to be divested by the exercise of a power, but which in default of appointment fell into possession after January 1st, 1883, such remainder will be outside the Act and will not be separate property: *Re Jackson's Will*, 13 Ch. D. 189. But if in the same case the power was exercised after the commencement of the Act the married woman would take under a new title, though she took the same interest, and in this case the property will be her separate property: *Sweetapple* v. *Horlock*, 11 Ch. D. 745 (*Jessel*, M. R.).

Restraint on anticipation.

Where a restraint on anticipation is attached to the separate property, there was, independently of the recent statute, no means of disposing of the property. Neither by applying to the court, *Robinson* v. *Wheelwright*, 6 De G., M. & G. 535, nor by means of the Fines and Recoveries Act, *Baggett* v. *Meux*, 1 Phill. C. C. 628, could the restraint be got rid of. The restraint on anticipation can be created by various forms of words; "without power of anticipation" is the most simple, but a direction to pay "to such persons as she shall after it has become due appoint," or for her "sole, separate and inalienable use" is sufficient (*l*). Like the separate

(*k*) The other decisions, which may appear to have some bearing on the point, are *Archer* v. *Kelly*, 1 Dr. & Sm. 300; *Brooks* v. *Keith*, *ibid.* 462; *Re Clinton's Trust*, L. R., 13 Eq. 295; *Re Michell's Trusts*, 9 Ch. D. 5.

(*l*) See Lewin on Trusts, p. 663.

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use it will arise on every subsequent marriage of the woman to whom it is applied, *Tullett* v. *Armstrong* (on appeal), 4 M. & C. 390; 1 Beav. 1, unless confined to some particular marriage: *King* v. *Lucas* (C. A.), 23 Ch. D. 712. It will not prevent a married woman from enlarging her estate tail where the restraint is on the life estate: *Cooper* v. *Macdonald* (C. A.), 7 Ch. D. 288, 300. It seems doubtful whether it prevents her being put to her election: *Smith* v. *Lucas*, 18 Ch. D. 531. By no ingenuity can property subject to such a restraint be disposed of during the coverture: *Pike* v. *Fitzgibbon* (C. A.), 17 Ch. D. 454, per *James*, L. J., at p. 459. And see the 19th section of the Married Women's Property Act, 1882, set out above p. 226.

40 & 41 Vict. c. 18, s. 6.

The Settled Estates Act, 1877, sect. 50, enacts (*inter alia*), that "no clause or provision in any settlement restraining anticipation shall prevent the court from exercising, if it shall think fit, any of the powers given by this Act."

44 & 45 Vict. c. 41, s. 39.

And by the Conveyancing Act, 1881, sect. 39:

Power for court to bind interests of married woman.

"(1) Notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property."

"(2) This section applies only to judgments or orders made after the commencement of this Act."

There have already been several decisions on this section. In *Hodges* v. *Hodges* (20 Ch. D. 749), *Fry*, J., dissolved the restraint in order to pay the debts of a married woman past childbearing. In *Tamplin* v. *Miller*, W. N. (1882), 44; 30 W. R. 422, V.-C. *Hall* lays great stress on the fact that the power of the court is to be exercised only for the benefit of the married woman. But he allowed her to compromise a claim in an administration suit in spite of a restraint. However, in *Re Warren's Settlement*, W. N. (1883), 125, the Court of Appeal held that the court would not presume a woman to be past child-bearing, at any rate without security being given for the repayment of the money in case of issue. In this case the wife was fifty, and the

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husband fifty-four years of age, and they had never had any children.

Where there was no restraint on anticipation the married woman could in equity, independently of statute, dispose of her separate estate of every description *inter vivos* without the concurrence of her husband, and without acknowledgment, exactly as if she were a *feme sole: Taylor* v. *Meads*, 4 De G., J. & S. 597; 34 L. J., Ch. 203; *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; 3 Bro. C. C. 8; *Carington* v. *Parker*, L. R., 4 Eq. 116. And now, under the Married Women's Property Act of 1882, she can dispose of her separate property created by the Act both at law and equity.

The legal estate.

A question arises which, if somewhat a narrow one, is of great importance to the conveyancer, namely, whether the married woman can dispose of the legal estate in separate property in existence before the Act without acknowledgment. Where the legal estate is vested in trustees no difficulty can arise. They must convey it according to the wishes of their *cestui que trust*, whether she is married or single. "There is no distinction, in my mind," said *Jessel*, M. R., in *Peters* v. *Lewes Rail. Co.* (C. A.), 18 Ch. D. 429, "between a trustee for a married woman, absolutely entitled to her separate use and not restrained from anticipation, and a trustee for a man," p. 437. And where a woman has, during the marriage and since the Act, property given her by deed or will to her separate use, without any trustee being appointed, it is presumed that it will be within both sects. 2 and 5, and that her husband will no longer take the legal estate in her right. This view is confirmed by the case of *In re March*, *Mander* v. *Harris*, 24 Ch. D. 222, stated above, p. 227. But it may be said that though sect. 1 (1) of the Act (*ante*, p. 225), applies to property coming within the Act, it does not alter the powers of a married woman over such part of her separate estate as was in existence before its commencement. Thus, suppose a married woman to have acquired property to her separate use before the Act passed, and that no trustees have been interposed, or that for some reason the legal estate

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is not in the trustees (see Lewin, 7th ed., p. 193 *et seq.*); clearly, until the Act passed, the legal estate would be in the husband in right of his wife, and to pass it an acknowledged deed would be necessary. Then what is the effect of the passing of the Act? Does it give the wife a new power of disposition? Does it apply to separate property already in existence? It is submitted that it does. For the only intelligible and consistent construction of the Act is to put all married women having separate property on a level. And, on comparison with other sections of the Act, it appears that many (*l*) of them clearly apply to separate property already in existence. Take, for instance, sect. 1 (3), which shifts the *onus probandi* as to contracting on the faith of separate property, and which must apply to separate property acquired before the Act, as well as to that acquired since. It is submitted, then, that where a married woman has real property which is held separately from her husband, however the separate property was created, she will, at any time after the Act, be able to dispose of the legal estate in it without his concurrence, and without acknowledgment; the effect of sect. 1 (1) being to enable the wife to dispose of the legal estate, before in the husband, as soon as the Act passed. But the purchaser who wishes for absolute security should insist on an acknowledgment, in such a case, until there is a decision on the point. This effect of the Act would also apply to personal property. Thus, suppose a testator bequeathed personalty to his widow for life, and after her death to his son and daughter as tenants in common, with a proviso that every female taking an interest under his will should take such interest to her separate use, and died, and the daughter married before the Act. Here the reversion would not be within sect. 5, and would, therefore, independently of sect. 1 (1), if it fell in during the marriage, belong to the husband at law, and he would hold it upon trust for his wife's separate use. But if before the death of the widow

(*l*) See sects. 1 (2), (3), (5), 10, 18, 20, 21, 23, 24.

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the wife were to mortgage it to A., would she be able to give him the legal interest in the reversion under sect. 1 (1), or must she acknowledge the deed under Malins' Act? It is submitted that, until there is some decision on the point, it would be unsafe to accept the mortgage without acknowledgment.

Trust estates.

The Act does not appear to give a married woman trustee, executrix or administratrix, the power to convey real estate without acknowledgment. Thus, if a widow administers, and in the course of administration invests on mortgage and then marries, she cannot re-convey the legal estate in the mortgaged property. Sect. 1 (1) only gives her the power of conveying property which is separate property; and separate property refers to a beneficial interest, and not to a trust estate. Otherwise by sect. 1 (3) every contract of a married woman would bind trust estates. Further than this, sect. 18 of the Act deals with a married woman executrix, administratrix or trustee, and confers on her powers of suing and transferring stock, but does not enable her to deal with real property. But by the Vendor and Purchaser Act, 1874, sect 6: "When any freehold or copyhold hereditaments shall be vested in a married woman as a bare trustee she may convey or surrender the same as if she were a *feme sole*." In *Christie* v. *Ovington*, 1 Ch. D. 279, *Hall*, V.-C., decided that a bare trustee was a trustee without any active duties. But in *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582, *Jessel*, M. R., disagreed with that view, and expressed an opinion that no trustee who had a beneficial interest could be a bare trustee. He added that, in his view, any trustee who had no beneficial interest could convey under the section, whether there were any active duties to perform under the trust or not.

Stat. 37 & 38 Vict. c. 78, s. 6.

Married woman bare trustee.

Contracts by married women.

At common law a married woman cannot contract, nor can she bind her real property or reversionary personalty without acknowledgment, *Williams* v. *Walker*, 9 Q. B. D. 576, even where practically separated from her husband: *Cahill* v. *Cahill*, 8 App. Cas. 420. In that case a wife, entitled to a jointure

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rent-charge on surviving her husband, left him. The husband commenced a suit for the restitution of conjugal rights. In consideration of his abandoning the suit, the wife purported, by an unacknowledged contract, to release her jointure. Held, that she could not be bound, except by acknowledgment (*m*). A married woman could, however, bind her separate estate in equity. Until the passing of the Act of 1882, the creditor was bound to prove that the engagement was made on the faith of the separate estate: *Johnson* v. *Gallagher*, 3 D., F. & J. 494, 514; 30 L. J., Ch. 298; 7 Jur., N. S. 273. And the married woman could only bind such separate estate as she possessed when the engagement was made: *Pike* v. *Fitzgibbon* (C. A.), 17 Ch. D. 454. But now (sect. 1 (2), (3), (4), above, p. 225), a married woman can contract at law; all her contracts bind her separate property until the contrary is proved, and bind property acquired after the date of the contract, as well as before it. The wife having a protection order, or who has obtained a judicial separation is in the same position as a *feme sole* (see above, p. 221); so is the wife of a convict, *Ex parte Frank*, 7 Bing. 762, or a wife having a separate trade, *Ashworth* v. *Outram* (C. A.), 5 Ch. D. 923, or trading by the custom of the City of London, *Beard* v. *Webb*, 2 B. & P. 93; but only, it is conceived, in respect to that separate trade.

No acknowledgment is therefore necessary to render valid the disposition of her separate property by a married woman, nor in making a contract binding upon it, nor in exercising a power of appointment, nor in a conveyance as "bare" trustee, under the Vendor and Purchaser Act, 1874, sect. 6; all which acts she can do without her husband's concurrence. Over her chattels real and personal in possession the husband has complete disposing power

(*m*) Where an agreement for a compromise in a probate suit, which was afterwards made a rule of court, was signed only by the husband, who was not a party to the suit, held, that the other party to the agreement could not enforce it against the wife: *Nicholl* v. *Jones*, L. R., 3 Eq. 696.

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without the concurrence of the wife. Copyholds which can be surrendered to the lord at law are excluded by sect. 77 of the Fines and Recoveries Act. On the other hand, acknowledgment is necessary where the wife wishes to bind or dispose of the beneficial property, or the legal estate in interests in land, or in reversionary interests in personalty, such land and personalty not being her separate property, nor vested in her as a "bare" trustee.

The clauses in the Fines and Recoveries Act, which relate to the acknowledgment of deed executed by married women, are as follows (*m*):—

3 & 4 Will. 4, c. 74.

Sect. 77. "After the 31st day of December, 1833, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this Act by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole;* save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that this Act shall not extend to lands held by a copy of court roll of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this Act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel."

Sect. 78. "The powers of disposition given to a married

(*m*) The provisions of the Fines and Recoveries (Ireland) Act, 4 & 5 Will. 4, c. 92, are almost identical with those contained in these sections, substituting the Irish Courts for the English. Some differences are noted below.

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woman by this Act shall not interfere with any power which, independently of this Act, may be vested in, or limited, or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing in consequence of such power having been suspended, or extinguished by such disposition" (*n*).

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a judge, &c.

Sect. 79. "Every deed to be executed by a married woman for any of the purposes of this Act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards (*o*), be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster (*p*), or a master in chancery (*q*), or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided" (*r*).

The judge, &c. before receiving such acknowledgment, to examine her apart from her husband.

Sect. 80. "Such judge, master in chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this Act, shall examine her apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and unless she freely and voluntarily consent to such deed shall not

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(*n*) The Irish Act has the following qualification:—"but such powers of disposition shall not enable a married woman to dispose of lands, or any estate therein, where the settlement or other instrument under which she may be entitled to the same shall contain a valid restriction against the anticipation thereof by such married woman." It was decided in *Baggett* v. *Meux* (1 Phillips, 627), that the restraint on anticipation could not be got rid of by means of the English Act. 4 & 5 Will. 4, c. 92, s. 69.

As to the other powers of disposition possessed by married women, see above, p. 230.

(*o*) There is no limit as to time of acknowledgment: *Re The London Dock Act*, 25 L. J., Ch. 45.

(*p*) The jurisdiction of the judges of the superior courts at Westminster was transferred to the judges of the Supreme Court by the Judicature Act, 1873, sects. 16, 19. An acknowledgment may now be made before the judge of a county court. See 19 & 20 Vict. c. 108, s. 73. Acknowledgments are now required to be taken before "one of the special commissioners, or one special commissioner." *Vide post*, p. 242.

(*q*) Abolished. 15 & 16 Vict. c. 80, s. 1.

(*r*) As to interested parties acting as commissioners, see below, Conveyancing Act, 1882 (repealing 17 & 18 Vict. c. 75), and the Rules of December, 1882.

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permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void" (*s*).

As to the appointment of perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

Sect. 81. "For the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas at Westminster (*t*) shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas at Westminster, with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke, or place, and such officer shall deliver a copy, signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same."

Power of perpetual commissioners not

Sect. 82. "Any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to

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(*s*) There is no jurisdiction to compel a married woman to convey by deed acknowledged pursuant to an order of the court: *Jordan* v. *Jones*, 2 Phillips, 170. See also *Billing* v. *Webb*, 12 Jur. 427; and *Field* v. *Moore*, 7 De G., M. & G. 691; *S. C.*, 7 Scott, N. R. 431.

Where a woman is deaf and dumb the nature of the transaction must be explained to her by signs, and she must signify her assent in like manner, and the fact should appear upon the certificate: *Re Harper*, 6 Man. & G. 732. So also in the case of a foreigner, the fact that the matter has been explained to her by, and her assent taken through, a competent interpreter should be stated in the certificate.

(*t*) The exclusive jurisdiction of the Court of Common Pleas is now vested in the Queen's Bench Division of the High Court by virtue of Judicature Act, 1873, sect. 34, and Order in Council, 16th December, 1880.

take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be" (*u*).

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Sect. 83. "In those cases where, by reason of residence beyond seas (*x*), or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this Act before a judge or a master in chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any persons therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid (*y*): provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit" (*z*).

confined to any particular place.

If, from being beyond seas, &c., a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

(*u*) The commissioner taking the acknowledgment in England need not be appointed for the county in which the acknowledgment is taken: *Blackmoor* v. *Blackmoor*: 3 Ch. D. 633.

The commissioners have a lien for their fees on the deed, and if the deed be in the possession of one only, he may, if authorized by the other, detain the deed for the other's lien: *Ex parte Grove*, 3 Bing. N. C. 364.

(*x*) As to the construction of the words "beyond seas" in Acts passed since the union with Ireland, see *Battersby* v. *Kirk*, 3 Scott, 11; *S. C.*, 2 Bing. N. C. 603.

The court has allowed a commission to go out to a colony with a blank for the christian name of the wife, *Re Apperton*, 1 C. B. 447, or of the husband, *Re Legge*, 15 C. B. 364; the names not being known in England.

(*y*) The form of a special commission issued under this section is as follows:—I (*name of judge*), one of the justices of the Queen's Bench Division of her Majesty's High Court of Justice, do, by virtue of the statute in that case made and provided, appoint A. B., of, &c., special commissioner to take the acknowledgment of Ann, the wife of E. F., now residing at ———, in ———, of any deed by which it is intended to pass the estate of her the said Ann [*or* to bar the dower of her the said Ann], as a married woman, pursuant to the statutes 3 & 4 Will. 4, c. 74, and 45 & 46 Vict. c. 39. And I do order and direct that this commission shall be executed and returned to the proper officer of the court on or before the ——— day of ———, 188 . Dated this ——— day of ———, 188 . Entered.

The application to the court to grant the order must be by motion. See further, as to the practice of the court with regard to special commissions, Shelford, R. P. Stat. 386.

(*z*) As to when the time for returning the commission will be enlarged, see *Re Booth*, 5 C. B., N. S. 540; *Re Carter*, 9 C. B., N. S. 791; *Re Van Ufford*, *Ibid.* 789.

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Sect. 84 (*a*). "When a married woman shall acknowledge any such deed as aforesaid, the judge, master in chancery, or commissioners taking such acknowledgment, shall sign a memorandum, to be endorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect, *videlicet* (*b*) :—

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned.

"This deed, marked [*here add some letter or other mark for the purpose of identification*], was this day produced before me [*or* us], and acknowledged by ——— therein named, to be her act and deed; previous to which acknowledgment the said ——— was examined by me [*or* us] separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her."

And also sign a certificate of the taking of such acknowledgment. (Repealed.)

[And the same judge, master in chancery, or commissioners shall also sign a certificate of the taking of such acknowledgment, to be written or engrossed on a separate piece of parchment; which certificate, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect, *videlicet* :—

["These are to certify, that on the ——— day of ———, in the year one thousand eight hundred and ———, before me the ———, undersigned ———, Lord Chief Justice of the Court of Common Pleas at Westminster [*or* before me ———, one of the Justices of the Court of King's Bench at Westminster, *or* before me the undersigned ———, one of the Masters in ordinary of the Court of Chancery, *or* before us ———, and ———, two of the perpetual commissioners, appointed for the ———, for taking the acknowledgments of deeds by married women, pursuant to an Act passed in the third and fourth years of the reign of his Majesty King William the

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(*a*) The latter part of this section, and also sects. 85 to 88, inclusive, are repealed. They are, however, retained in the text for purpose of reference in cases governed by the old law. As to future acknowledgments, *vide infra*, p. 242.

(*b*) The form substituted for that in the Act is set out at p. 245, below, Rules, Dec. 1882, rr. 3, 4, 5. A question arises whether, since the repeal of the 84th section, a married woman need be of full age in order to dispose of property by acknowledgment. The old form of certificate contained a statement that the woman was of full age; but in *Re Tracy*, 6 Q. B. D. 154, where the married woman infant was ordered by the Chancery Division to acknowledge the deed, the Court varied the certificate by leaving out the words of full age.

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Fourth, intituled An Act [*insert the title of this Act*], *or* before us the undersigned ———, and ———, two of the commissioners specially appointed, pursuant to an Act passed in the third and fourth years of the reign of his Majesty King William the Fourth, intituled An Act [*insert the title of this Act*], for taking the acknowledgment of any deed by ———, the wife of ———], appeared personally ———, the wife of ———, and produced a certain indenture, marked [*here add the mark*], bearing date, the ——— day of ———, and made between [*insert the names of the parties*] and acknowledged the same to be her act and deed: And I [*or* we] do hereby certify that the said ——— was at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by me [*or* us], apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same."

Certificate, with affidavit verifying the same, to be lodged with some officer of the Court of Common Pleas, who shall cause the same to be filed of record in the Court. (Repealed.)

[Sect. 85. "Every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some judge or master in Chancery, or by two commissioners appointed pursuant to this Act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and if all the requisites in this Act in regard to the said certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas."

On filing certificate, the deed, by relation, to take effect from the time of acknowledgment. (Repealed.)

[Sect. 86. "When the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman whose acknowledgment shall be so certified, concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment."

The officer with whom the certificates are lodged to make an index of the same. (Repealed.)

[Sect. 87. "The officer of the Court of Common Pleas with whom such certificates as aforesaid shall be lodged shall make and keep an index of the same; and such index shall contain the names of the married women and their husbands alphabetically

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arranged, and the dates of such certificates, and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient; and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed."

Officer to deliver copies of certificate, which shall be evidence. (Repealed.)

[Sect. 88. "After the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer."]

Chief Justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the court to make orders touching the examination, memorandums, certificates, affidavits, &c.

Sect. 89. "The Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged, and may remove him at pleasure; and the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this Act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters, and things required by this Act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations."

A married woman to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal.

Sect. 90. "In every case in which a husband and wife shall either in or out of court, surrender into the hands of the lord of a manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands were an estate at law instead of a mere estate in equity: and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid."

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Sect. 91. "If a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause (*c*) be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce (*d*), or in consequence of his being transported beyond the seas, or from any other cause whatsoever (*e*), it shall be law-

Court of Common Pleas in the case of a husband being lunatic, &c., may dispense with his concurrence, except where the

(*c*) In the recent case of *Re Mary Jane Hart* (W. N. (1882) 36), V.-C. *Hall* granted the dispensation, though no contract had been made, notwithstanding the decision in *Re Graham*, 13 W. R. 782; 19 C. B., N. S. 370. Where the husband's concurrence is dispensed with the wife need not acknowledge the deed: *Goodchild* v. *Dougal*, 3 Ch. D. 650. It is to be observed that it is not only under this Act that the husband's concurrence can be dispensed with, but also where under a marriage settlement the husband's concurrence was necessary in order to exercise a power of sale: *Re Eden*, 5 C. B., N. S. 232; 28 L. J., C. P. 4, in the case of separate property: *Ex parte Yarnall*, 17 C. B. 189; *Re Perrin*, 14 C. B. 420; *Ex parte Andrews*, 19 C. B., N. S. 371. The husband must be shown to be of unsound mind at the time of the application: *Re Turner*, 3 C. B. 166; *Re Murphy*, 5 Scott, N. R. 166; 4 Man. & Gr. 635. As to disability by reason of infancy: *Re Haigh*, 2 C. B., N. S. 193; 26 L. J., C. P. 209; 3 Jur., N. S. 371.

(*d*) This refers to the old divorce, *a mensâ et thoro*, by the ecclesiastical court. Under the Act of 1857, a decree absolute for the dissolution of a marriage has the same effect as if the husband had died at the date of the decree absolute. Property coming to a wife after the sentence of judicial separation, or (where she has a protection order) after the date of desertion, can be disposed of by her as a *feme sole:* see *ante*, p. 221. But a wife judicially separated, or who has obtained a protection order must, in order to dispose of property acquired before the date of such sentence or desertion, apply under this section.

(*e*) In *Goodchild* v. *Dougal*, 3 Ch. D. 650, *Jessel*, M. R., observed that: "The whole object of acknowledgment is to protect the wife against the husband's influence, and that the cases in which his concurrence is dispensed with are all cases in which it is impossible that he can influence her. I think that the meaning of the section is that in those cases she is for all purposes to be a *feme sole*, and consequently that acknowledgment is in those cases unnecessary:" p. 654. But the court must be satisfied that the husband is not supporting the wife: *Ex parte Robinson*, L. R., 4 C. P. 205. But see *Re Caine*, 10 Q. B. D. 284. Where an order had been made on affidavit of the wife the court refused to rescind the order on the evidence of the husband where the rights of third parties had intervened: *Re Rogers*, L. R., 1 C. P. 47. Cases of desertion where the concurrence has been dispensed with will be found in *Ex parte Gill*, 1 Bing. New Rep.

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ful for the Court of Common Pleas at Westminster (*f*), by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this Act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this Act) be as good and valid as they would have been if the husband had concurred: Provided always, that this clause shall not extend to the case of a married woman where under this Act the Lord High Chancellor, lord keeper, or lords commissioners for the custody of the Great Seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement in lieu of her husband."

Lord Chancellor or other persons intrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

Stat. 45 & 46 Vict. c. 39.

By sect. 7 of the Conveyancing Act, 1882, it is enacted as follows:—

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"7.—(1) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words 'two of the perpetual commissioners, or two special com-

168; *Ex parte Shirley*, 5 Bing. New Rep. 226; *S. C.*, 7 Dowl. P. C. 843; *Ex parte Stone*, 9 Dowl. P. C. 843; *Anon.*, 2 Jur. 945, in all which cases the husband had been away for years and his address was unknown. But the order was refused in *Ex parte Gilmore*, 3 C. B. 967; *Ex parte Taylor*, 7 C. B. 1, where there was no sufficient ground for believing that it was not the husband's intention to return. See also *Re Squires*, 17 C. B. 176, where he was in correspondence with his wife. Where the parties are living apart by mutual consent, and the husband requires a money payment before he concurs, the court will make the order: *Re Woodcock*, 1 Man. & G., N. S. 437; *Re Caine*, 10 Q. B. D. 284; but the husband must have been applied to: *Ex parte Trenery*, 1 C. B., N. S. 187, and there must be an affidavit of the wife herself: *Re Williams*, 2 Scott, N. R. 120; *Ex parte Bruce*, 9 Dowl. P. C. 840; and it is not sufficient to state that the wife has left the husband on the ground of his violence, and that he has refused to concur: *Re Price*, 13 C. B., N. S. 286.

(*f*) Now the Queen's Bench Division: see above, p. 236.

missioners,' the words 'one of the perpetual commissioners, or one special commissioner;' and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the word 'persons' the word 'person,' and for the word 'commissioners' the words 'a commissioner;' and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

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"(2) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

"(3) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and General Rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such Rule shall make invalid any acknowledgment; and those Rules shall, as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.
40 & 41 Vict. c. 57.

"(4) The enactments described in the schedule to this Act are hereby repealed (*g*).

(*g*) The Schedule is as follows:—

Repeals.

"3 & 4 Will. 4, c. 74. in part.	The Fines and Recoveries Act. . in part; namely,— Section eighty-four, from and including the words 'and the same judge,' to the end of that section. Sections eighty-five to eighty-eight, inclusive.

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"(5) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

"(6) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted (*h*).

"(7) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

"(8) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers."

The following are the "Rules under the Act for the Abolition of Fines and Recoveries, and sect. 7

"4 & 5 Will. 4, c. 92. in part.	The Fines and Recoveries (Ireland) Act .. .. } in part; namely,— Section seventy-five, from and including the words 'and the same judge,' to the end of that section. Sections seventy-six to seventy-nine, inclusive.
"17 & 18 Vict. c. 75.	An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.
"41 & 42 Vict. c. 23.	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878."

(*h*) As to what informalities will prevent a certificate from being filed under the old Act, see Shelford's Real Property Statutes, 8th ed. 389, 400; *Re Packer*, L. R., 5 C. P. 424; *Re Ashcroft*, L. R., 9 C. P. 473; *Re Eleanor Mary Mann*, L. R., 10 C. P. 473; *Re Thomas*, L. R., 10 C. P. 472; *Re Coldwell*, L. R., 10 C. P. 667; *Re Sandilands*, L. R., 6 C. P. 411.

of the Conveyancing Act, 1882," issued in December, 1882:— Acknowledgment by Married Women.

1. No person authorized or appointed under the Act 3 & 4 Will. 4, c. 74 (in these rules referred to as the Fines and Recoveries Act) to take the acknowledgment of deeds by married women shall take any such acknowledgment if he is interested or concerned, either as a party or as solicitor or clerk to the solicitor for one of the parties, or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative and the commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment; but if it shall appear to him that it is intended that provision is to be made for the married woman, then the commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof (*i*).

3. The memorandum to be indorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in sect. 84 of the Fines and Recoveries Act:

"This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her."

4. When an acknowledgment is taken by any person other

(*i*) As to the assent of a married woman who is deaf and dumb, see *Re Harper*, 7 Scott, N. R. 431; *S. C.*, 6 Man. & G. 732; *ante*, p. 236, and Precedent III., *post*, p. 260.

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than a judge, the following declaration shall be added to the memorandum of acknowledgment:

"And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment."

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorized to take the acknowledgment:—

(Signed) *A. B.*

A judge of the High Court of Justice in England;

or A judge of the county court of ;

or A perpetual commissioner for taking acknowledgments of deeds by married women;

or The special commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorized to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every commission appointing a special commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office (*k*).

8. The costs to be allowed to solicitors in respect of the matters hereinafter mentioned, when not otherwise regulated by the general orders in force for the time being under the Solicitors' Remuneration Act, 1881, or by special agreement, shall be as follows; anything in the Rules of the Supreme Court as to costs, dated the 12th August, 1875, to the contrary notwithstanding:—

(*k*) See R. S. C. 1883, Order LXI. rr. 21, 23.

Acknowledgment by Married Women.

Charges under the Act 3 & 4 *Will.* 4, *c.* 74 (*the Fines and Recoveries Act*).

	£	*s.*	*d.*
For the endorsements on deeds required by the Fines and Recoveries Act, to be entered on the court rolls of manors of the memorandum of production and memorandum of entry on Court Rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum 5*s.*, together	0	10	0
For the entries on the court rolls of deeds and the indorsements thereon, at per folio of 72 words	0	0	6
For taking the consent of each protector of settlement of lands	0	13	4
For taking the surrender by each tenant in tail of lands	0	13	4
For entries of such surrenders or the memorandums thereof in the court rolls, at per folio of 72 words ..	0	0	6

9. The following Rules and Orders are hereby repealed, except as to certificates not lodged before the 1st January, 1883, of acknowledgments by married women of deeds executed before the 1st January, 1883, and the affidavits relating thereto:

The General Rules of the Court of Common Pleas, Hil. Term, 1834.

The General Rules of the Court of Common Pleas, Trin. Term, 1834.

The General Order of the Court of Common Pleas, dated the 24th November, 1862.

The General Order of the Court of Common Pleas, dated the 13th January, 1863.

10. These Rules shall take effect from and after the 31st December, 1882.

And by the "Order as to Court Fees," issued at the same time, the following fees are henceforth made chargeable under the Fines and Recoveries Act (*l*):—

	£	*s.*	*d.*
For taking the acknowledgment of a married woman by a judge of the High Court of Justice	1	0	0
To a perpetual commissioner for taking the acknowledgment of a married woman when not required to go further than a mile from his residence	0	13	4

(*l*) Upon a sale (in the absence of stipulation to the contrary) the vendor pays the costs of taking the acknowledgment of a married woman: Dart, V. & P. p. 707.

	£	s.	d.
Acknowledgment by Married Women. To a perpetual commissioner when required to go more than one mile, but not more than three miles, besides his reasonable travelling expenses	1	1	0
To a perpetual commissioner where the distance exceeds three miles, besides his reasonable travelling expenses	2	2	0
Where more than one married woman at the same time acknowledges the same deed respecting the same property, these fees are to be taken for the first acknowledgment only, and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one-half of the original fees, and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property.			
To the clerk of the peace or his deputy for every search	0	1	0
To the same for every copy of a list of commissioners, provided such list shall not exceed the number of 100 names	0	5	0
To the same for every further complete number of 50 names, an additional	0	2	6
For every official copy of a list of commissioners, provided such list shall not exceed the number of 100 names	0	5	0
For every further complete number of 50 names, additional	0	2	6
For preparing every special commission	1	0	0
For examining the certificate and affidavit, and filing, and indexing the same	0	5	0
Upon the return of a special commission to the central office	0	5	0
For every search in the registry of certificates of acknowledgments of deeds by married women	0	1	0
For enrolling recognizances, deeds, and other instruments, per folio of 72 words, including the certificate of enrolment endorsed on the instrument, but not including maps, plans, and drawings, which are to be charged at their actual cost	0	1	0
For endorsing a certificate of enrolment on a duplicate of any enrolled instrument, for each folio of the instrument if it does not exceed 24 folios	0	0	6
For the like certificate if the instrument exceeds 24 folios	0	12	0

	£	s.	d.
For office copies of enrolled instruments, per folio of 72 words	0	0	6
For examining copies of enrolled instruments and marking them as office copies, per folio of 72 words ..	0	0	2

Acknowledgment by Married Women.

By 20 & 21 Vict. c. 57, commonly called Malins' Act, it is enacted that—

Stat. 20 & 21 Vict. c. 57.

Sect. 1. "After the 31st day of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever (*m*), to which she shall be entitled under any instrument made after the said 31st of December, 1857 (*n*), (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a *feme sole* (*o*), and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed; provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by

Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their rights to a settlement out of such estate in possession.

(*m*) See above, pp. 227—231, as to powers of disposing of reversionary personal property.

(*n*) She can only dispose of property coming to her under an instrument, and therefore not of a reversion under an intestacy. The instrument must have been made before the 31st of December, 1857.

Where the married woman claimed under an appointment executed since the Act, under a power created before the Act, it was held that the instrument under which she was entitled was the instrument creating the power, not the instrument executing it: *Re Butler's Trusts*, I. R., 3 Eq. 138. And see *Clarke* v. *Green*, 2 H. & M. 474; and see *ante*, p. 214.

(*o*) The disposition is the married woman's, and not the husband's. Thus, where a married woman, whose husband was indebted to a testator, had assigned her reversionary interest under his will, by this Act the executors could not retain: *In re Batchellor*, L. R., 16 Eq. 481, followed in *Re Jakeman's Trusts*, 23 Ch. D. 344. It was decided in that case that the husband was not precluded by his bankruptcy from concurring in his wife's conveyance.

Acknowledgment by Married Women.

virtue of any deed, will or instrument, by which she shall be restrained from alienating or affecting the same."

Deeds to be acknowledged by married women in the manner required by 3 & 4 Will. 4, c. 74, for disposing of interests in or powers over land in England or Wales; In Ireland, as by 4 & 5 Will. 4, c. 92.

Sect. 2. "Every deed to be executed in England or Wales (*p*) by a married woman for any of the purposes of this Act shall be acknowledged by her, and be otherwise perfected, in the manner by the Act 3 & 4 Will. 4, c. 74, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land (*q*); and every deed to be executed in Ireland (*p*) by a married woman for any of the purposes of this Act shall be acknowledged by her and be otherwise perfected in the manner by the Act 4 & 5 Will. 4, c. 92, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land (*q*), and all and singular the clauses and provisions in the said Acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said Acts mentioned, shall extend and be applicable to such interests in personal estate, and to such powers as may be disposed of, released, or extinguished by virtue of this Act, as fully and effectually as if such interests or powers were interests in or powers over land."

The powers of disposition given by this Act not to interfere with any other powers.

Sect. 3. "Provided always, that the powers of disposition given to a married woman by this Act shall not interfere with any power which independently of this Act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition."

Act not to extend to settlements of married

Sect. 4. "Provided always, that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or

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(*p*) Where a married woman is domiciled abroad her right to dispose of interests in personal property is regulated by the *lex domicilii*: *Guepratte* v. *Young*, 4 De G. & S. 217; *Duncan* v. *Cannan*, 18 Beav. 128.

(*q*) It is presumed that the new procedure introduced by the Conveyancing Act, 1882, applies to this Act (though there is no reference to it), as well as to the Fines and Recoveries Act, set out above, p. 242. By the Conveyancing Act, 1882, sect. 7 (1), the 3 & 4 Will. 4, c. 74, is now to be read as if one commissioner were substituted for two, and, therefore, in future, the manner prescribed for the acknowledgment and perfecting of deeds by 3 & 4 Will. 4, c. 74, is acknowledgment before one commissioner. In respect to its operation on Malins' Act, the Conveyancing Act cannot be said to be very happily drawn.

agreement for a settlement made on the occasion of her marriage "(*r*).

Production of Deeds.

women upon marriage.

Sect. 5. "This Act shall not extend to Scotland."

Not to extend to Scotland.

2. Acknowledgment of Right to Production of Deeds.

The Conveyancing and Law of Property Act, 1881, contains provisions intended, in cases where documents are retained by vendors, to supersede the covenants for production formerly used by shorter and simpler forms of—(1) acknowledgment of the purchaser's right to production and delivery of copies of the documents retained, and (2) undertaking for safe custody of such documents.

These provisions are as follows:—

Acknowledgment of right to production, and undertaking for safe custody of documents.

Sect. 9.—"(1) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

"(2) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

"(3) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming

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(*r*) A husband and wife, in contemplation of their marriage, executed an agreement to settle a fund of the wife's for her separate use, to return to the husband if he should survive. It was held, that the meaning of the agreement was that the fund was to be preserved during the coverture, and that the wife would take an absolute interest, if she should survive; and it was further held, that such reversionary interest of the wife was within the exception contained in this section: *Clarke* v. *Green*, 2 H. & M. 474; see *ante*, pp. 214, 249.

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any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

"(4) The obligations imposed under this section by an acknowledgment are—

"(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and

"(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

"(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

"(5) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

"(6) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

"(7) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

"(8) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

"(9) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on

every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident. Production of Deeds.

"(10) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

"(11) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

"(12) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

"(13) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

"(14) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act."

Sub-sects. 1 to 8, inclusive, of the foregoing section, treat of Acknowledgments; sub-sects. 9 to 11 deal with Undertakings. The two are distinct in operation and effect, and may be given either separately or together. Where both are given by the same person an obligation is created, which is very similar to the qualified covenant for production of deeds formerly entered into by fiduciary vendors. Effect of the section.

Two conditions are necessary to give statutory effect to an acknowledgment under this section—(1) It must be given by a person who *retains possession* of documents; (2) It must be an acknowledgment not only of the right to production, but also to delivery of copies.

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Nature and effect of a statutory acknowledgment.

An acknowledgment given in the terms of the section, but not fulfilling the first condition, would have effect in accordance with its terms, the precise nature of which it would perhaps be difficult to define in the absence of legal decision. It is obvious that a statutory acknowledgment should not be given by a person who has not the documents in his possession or control; such as a beneficial tenant for life where the legal estate is vested in trustees, or a mortgagor. Where, on a sale by a mortgagee and mortgagor of part of the mortgaged property, it is intended that documents of title shall be retained by the mortgagee, the mortgagee alone can give a statutory acknowledgment, and the mortgagor will enter into a covenant, in the old form, to procure the production of the deeds: *infra*, Precedent VIII., p. 266.

Meaning of "retain."

The word "retain" appears, at first sight, not strictly applicable to the case of a purchaser of the largest lot, on a sale by auction, to whom title deeds affecting the whole of the property sold are delivered on completion of the purchase; but it is conceived that there can be little doubt that it would be to adopt too narrow a construction to hold that such a person is disqualified to give a statutory acknowledgment and undertaking to the purchasers of other lots. It is to be observed that the substitution of an acknowledgment and undertaking for a covenant is permissive only, not obligatory; and, therefore, a person not precluded by special stipulation may, if he pleases, enter into a covenant in the old form instead of giving an acknowledgment and undertaking in the terms of this Act; inasmuch, however, as an unqualified covenant, in the old form, is more onerous in its terms, it is not likely that this course will be adopted, unless under exceptional circumstances. An acknowledgment is "to satisfy any liability to give a covenant;" and consequently it is to be presumed that a stipulation in a contract, or conditions of sale, that an express covenant should be given, could not be insisted on.

A statutory acknowledgment attaches to the documents themselves, and will follow them into the

hands of all persons in whose possession or control they may come from time to time, or, in other words, it will "run with" the documents. Specific performance of the obligation may be enforced by the Court on summary application. See sect. 69 of the Act. An acknowledgment, however, merely applies to the documents, so long as they are not destroyed or lost, and imposes no liability on any person for their destruction, injury, or loss. Production of Deeds.

Liability for damages in this respect arises only on the giving of an undertaking under sub-sect. 9. The obligation to produce and deliver copies of the documents ceases to affect the person who originally gives the acknowledgment on his parting with the documents, and is transferred to every subsequent possessor in turn, thus rendering unnecessary the insertion of any clause, such as was not unusual in covenants for production, providing that the original covenantor's liability should cease on his procuring a substituted covenant from the transferee of the deeds. Trustees and mortgagees may, therefore, with perfect safety, give to a purchaser an acknowledgment in the terms of the statute. The obligation to produce the documents while in their possession or control imposes no undue burthen, and, on their parting with the documents, all liability under a statutory acknowledgment ceases. No liability to damages under an acknowledgment.

The ordinary covenant to produce deeds runs with the documents, like a statutory acknowledgment, but questions have arisen as to how far it runs with the land, so as to bind the alience of the vendor: see on this point, *Barclay* v. *Raine*, 1 Sim. & St. 449; and the observations of the Real Property Commissioners (3rd Report, p. 56), cited and commented upon by Lord St. Leonards in Sugd. Vend. 453. These doubts are now set at rest by sub-sect. 3 of this section, whereby the right is given to the purchaser, or any person claiming under him, &c., to enforce production of the deeds against all persons claiming and holding them through the vendor.

Lord St. Leonards recommends that a covenant to produce deeds should authorize the purchaser to take copies or extracts from them, unless the price to be

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paid for them be limited to their mere cost (see Sudg. Vend. 452); but it has not been the usual practice of conveyancers to insert any provision to that effect. Sect. 16 of this Act expressly gives this right in the case of a mortgagor.

Costs.

It is to be observed that this section does not contain any provision as to the cost of preparing and furnishing the purchaser with a statutory acknowledgment and undertaking; in the case of a covenant for production, these costs are, by the Vendor and Purchaser Act, 1874, sect. 2, thrown on the purchaser. It would, therefore, seem that, in the absence of stipulation, these costs must be borne by the vendor, as was the former rule with regard to covenants for production. See *Boughton* v. *Jewell*, 15 Ves. 176. These expenses will, however, be generally very trifling, and inasmuch as the vendor may require the purchaser to accept a covenant for production, to be prepared at his own expense, the point is not likely to give rise to any material difficulty in practice.

Statutory undertaking

A statutory undertaking imposes on the giver a personal liability for damages in case of loss or destruction of the deeds; this liability ceases when the documents pass out of his possession or control, and thenceforth devolves on the transferee.

As to the measure of damages for loss or injury of deeds, see *Hornby* v. *Matcham*, 16 Sim. 325; *Brown* v. *Sewell*, 11 Ha. 49; see also *James* v. *Ramsay*, 11 Ch. D. 398, where a lease deposited with mortgagees having been lost, it was held that the mortgagor was entitled to an indemnity, but not to compensation for the loss.

Whether trustees should give an undertaking.

Considerable difference of opinion has arisen among members of the legal profession as to whether or not trustees can be required to give an undertaking for safe custody of deeds retained by them, under an open contract entered into by themselves, or by the equitable tenant for life for the sale of land. It is to be borne in mind that it has hitherto been a settled rule that, in the absence of stipulation to the contrary, a purchaser is entitled to the deeds, or to a valid covenant for their production: *Cooper*

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v. *Emery*, 1 Phillips, 388; *S. C.*, 10 Sim. 609; *Barclay* v. *Raine*, 1 Sim. & St. 449; see also Sugd. Vend. 434. In the case of trustee vendors the usual practice, formerly, was that they should enter into a covenant, not only for production of the deeds, but also for the safe custody thereof, the obligation being limited so as to bind covenantors only so long as they should respectively continue trustees, and as such hold or be entitled to hold the documents (*s*). See the forms of covenants given in Lewin on Trusts, p. 387, note (*d*). This obligation was thus in effect identical with that incurred by a person giving both an acknowledgment and also an undertaking under this section. Latterly, however, it appears to have become the practice of several eminent conveyancers to limit the liability imposed in covenants by trustees for production and safe custody to so long only as they should have the "actual custody" of the documents.

A statutory undertaking renders the giver liable so long as the documents are in his "possession *or control*," *i.e.*, not only for his own acts, but for the acts of his agents or others to whose charge he may have committed the documents. It is an admitted principle that trustees cannot generally be required to covenant except for their own acts; but it may be questioned whether the principle is applicable so as to relieve them from giving any undertaking whatever with regard to documents of title retained by them, merely because the form provided by the statute imposes on them an obligation somewhat more onerous than that which they have been in the habit of incurring without question.

If the rule is to be admitted that trustees are to give only an acknowledgment, and no undertaking, purchasers from them (or from an equitable tenant for life who does not hold the deeds) will have no security for the proper care of the documents necessary to establish the title, nor any remedy in case of their loss, injury or destruction, "from

(*s*) A proviso wholly repugnant to a covenant creating a liability is void; but a proviso merely limiting the liability is valid: *Williams* v. *Hathaway*, 6 Ch. D. 544.

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whatever cause arising," or even in case of a sale by the trustees of the lands retained, and of the deeds being handed over to the purchaser. It will be observed, moreover, that in the case of lands purchased or taken in exchange from persons who have given undertakings and conveyed to trustees, the liability with regard to safe custody of the documents will necessarily attach to the trustees on the completion of the transaction: it has indeed been suggested that in such a case the trustees should require an indemnity from the tenant for life, before complying with his directions to apply trust moneys in the purchase of land (*t*), or accepting a conveyance; but that would surely be to carry the notion of protecting trustees rather far.

The question above discussed cannot be regarded as free from doubt until it shall be settled by judicial decision; and till then counsel acting for purchasers from trustees will probably insert undertakings, and counsel for conveying trustees will endeavour to strike them out; but, for the reasons above given, it is conceived that a purchaser under an open contract may insist upon the undertaking being retained in the case of fiduciary as well as beneficial vendors. In one of the following precedents will be found a proviso qualifying, in the case of trustees, the liability imposed by a statutory undertaking in a manner which perhaps may, in case of dispute, be accepted as affording a compromise satisfying the reasonable requirements of both parties: *vide post*, p. 261. Of course, where it is practicable, trustees may protect themselves by special stipulation from being required to give an undertaking.

As to mortgagees.

Mortgagees can protect themselves by making their concurrence in any transaction conditional on not being required to give more than an acknowledgment.

Stamp.

A statutory acknowledgment and undertaking under the Conveyancing Act, 1881, need not generally be under seal: where it is under hand only, it is doubtful whether or not any stamp is necessary; but the safest course is to put on it a 6*d.* agreement stamp.

(*t*) See Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22 (2).

PRECEDENTS.

I. *MEMORANDUM by a* JUDGE *to be endorsed on or written at the Foot or in the Margin of a* DEED ACKNOWLEDGED *by a* MARRIED WOMAN.

Memorandum by judge.

THIS deed was this day produced before me and acknowledged by [*insert names in full of the married woman and her husband*] therein named, to be her act and deed, previous to which acknowledgment the said married woman was examined by me, separately and apart from her husband, touching her knowledge of the contents of the said deed, and her consent thereto, and declared the same to be freely and voluntarily executed by her.

WITNESS my hand this ——— day of ———, 18—.

(Signed) A. B.,
A judge of the High Court of Justice in England, *or* a judge of the County Court of ———.

II. *MEMORANDUM by a* COMMISSIONER *to be endorsed on or written at the Foot or in the Margin of a* DEED ACKNOWLEDGED *by several* MARRIED WOMEN.

Memorandum by perpetual commissioner.

THIS deed was this day produced before me and acknowledged by [*names in full of the married women and their husbands*] therein named, to be their several acts and deeds, previous to which acknowledgments the said [*married women*] were examined by me separately and apart from their respective husbands touching their respective knowledge of the contents of the said deed, and their consent thereto, and each of them declared the same to be freely and voluntarily executed by her: AND I DECLARE that I am not interested or concerned either as a party, or as a solicitor, or clerk to a

Declaration.

II. Memorandum by Commissioner.

solicitor of one of the parties, or otherwise, in the transaction giving occasion for the said acknowledgment.

WITNESS my hand this ——— day of ———, 18—.

(Signed) A. B.,
A perpetual commissioner for taking acknowledgments of deeds by married women.

III. *MEMORANDUM by a* SPECIAL COMMISSIONER *to be endorsed on or written at the Foot or in the Margin of a* DEED ACKNOWLEDGED *by a* MARRIED WOMAN *who is a* FOREIGNER *or* DEAF *and* DUMB (*a*).

Memorandum by special commissioner.

THIS deed was this day produced before me and acknowledged by [*names in full of the married woman and her husband*] therein named, to be her act and deed, previous to which acknowledgment the said [*married woman*], being an Italian [*or* being deaf and dumb], the nature, purport, and contents of the said deed were fully explained to her in my presence by C. D., being a person accustomed and competent to hold conversation in the Italian language [*or* to hold conversation by signs with the said (*married woman*), *or* with deaf and dumb persons]; and the said [*married woman*] was then also examined by me separately and apart from her husband by means of the interpretation of the said C. D., touching her knowledge of the contents of the said deed, and her consent thereto, and from the aforesaid explanation and interpreted examination, I am satisfied that the said married woman freely and voluntarily executed the said deed: AND I DECLARE, &c.

Declaration.

(Signed) A. B.,
The special commissioner appointed to take the aforesaid acknowledgment.

(*a*) This form is adapted from the form of certificate of acknowledgment approved by the court in the case of *Re Harper*, 6 Man. & G. 732, where the married woman was deaf and dumb. A variation from the form of memorandum prescribed by the rules does not render the acknowledgment invalid (*ante*, p. 246); and certificates being no longer required, it appears advisable that special circumstances attending the taking of the acknowledgment should be stated in the memorandum.

IV. *ACKNOWLEDGMENT by a* VENDOR *of a* PURCHASER'S *Right to* PRODUCTION *of* DEEDS, *&c. and* UNDERTAKING *for the safe* CUSTODY *thereof.*

MEMORANDUM.

WHEREAS by an indenture, bearing even date with and executed before this memorandum, and expressed to be made between [*vendor*], of the one part, and [*purchaser*], of the other part, for the consideration therein mentioned, a certain leasehold piece of land situate at ——— in the county of ———, has been assigned and conveyed to the said [*purchaser*] for the residue henceforth to come of the term of 99 years created by an indenture of lease dated the ——— day of ———, 18—, and expressed to be made between [*parties*]: AND WHEREAS the deeds and documents specified in the schedule hereunder written relate not only to the premises comprised in the hereinbefore-recited indenture, but also to other property of the said [*vendor*], and it has been agreed that the said [*vendor*] shall retain possession of such deeds and documents, and that he shall give the acknowledgment and undertaking hereinafter contained respectively, with regard to the same: NOW THEREFORE, the said [*vendor*] hereby acknowledges the right of the said [*purchaser*] to the production of the several deeds and writings specified in the schedule hereunder written, and to delivery of copies thereof, and he hereby undertakes for the safe custody thereof. As WITNESS the hand of the said [*vendor*].

Recitals; of assignment of even date;

of agreement that deeds shall be retained by the vendor.

Acknowledgment.

THE SCHEDULE ABOVE REFERRED TO.

V. *ACKNOWLEDGMENT by* TRUSTEES, *on a Sale by a Tenant for Life of the* PURCHASER'S *Right to* PRODUCTION *of* DEEDS, *&c., and qualified* UNDERTAKING *for safe* CUSTODY *thereof* (*b*).

MEMORANDUM.

WHEREAS by an indenture bearing even date with and executed before this memorandum, and expressed to be made between [*tenant for life*], the tenant for life in possession of the estates devised by the will of [*testator*], late of, &c., de-

Recitals; of conveyance of even date;

(*b*) See note (*b*), *infra*, p. 262.

V. Acknowledgment, &c. by Trustees.

ceased, of the first part; [*trustees*] the trustees of the said will, of the second part; and [*purchaser*], of the third part; in consideration of the sum of £———, by the direction of the said [*tenant for life*], paid to the said [*trustees*] by the said [*purchaser*], and by virtue of the statutory and other powers vested in the said [*tenant for life*], as such tenant for life as aforesaid, certain lands and hereditaments, situate in the parish of ———, in the county of ———, have been conveyed by way of sale to the use of the said [*purchaser*] in fee simple in possession, free from incumbrances: AND WHEREAS the several deeds and writings specified in the schedule hereunder written relate not only to the lands and hereditaments conveyed by the hereinbefore-recited indenture, but also to other property, subject to the said will; and upon the contract for the said sale it was agreed that the said [*trustees*] shall retain possession of such deeds and writings, and shall give such acknowledgment and undertaking with regard to the same as are hereinafter contained: NOW THEREFORE, the said [*trustees*], at the request and by the direction of the said [*tenant for life*], testified by his signing this memorandum, do and each of them them doth hereby acknowledge the right of the said [*purchaser*] to the production and delivery of copies of the several deeds and writings specified in said schedule hereunder written, and which are retained by the said [*trustees*] in their possession (*b*). AND the said [*trustees*] hereby do,

of agreement that deeds shall be retained.

Acknowledgment.

(*b*) The above precedent is applicable to the case of trustees, who, having the legal estate devised to them, retain possession of the documents. Where the legal estate is given to the tenant for life, as is generally the case in settlements by deed, and often the case in wills, he will have possession of the documents, and accordingly should enter into an acknowledgment and undertaking like an ordinary vendor (see last Precedent). Where trustees sell on behalf of an infant under the powers of the Settled Land Act, 1882, s. 60, the recital of the conveyance will require modification, and the request, &c. of the tenant for life will be omitted.

It has, in modern times, been the usual practice that trustees should enter into covenants for production of deeds, limited to so long as they should remain trustees, and have or be entitled to the custody of the documents: see Lewin on Trusts, p. 387. Frequently the covenant further purported to bind the documents, so far as might be, in the hands of other holders, but so as not to create any further liability for damages or otherwise. It is conceived that the latter proviso would be void, as being wholly repugnant to the covenant creating the liability: see *Williams* v. *Hathaway*, 6 Ch. D. 544.

and each of them doth, at the request and by the direction aforesaid, undertake with the said [*purchaser*] for the safe custody of the same deeds and writings; PROVIDED always, that nothing herein contained shall impose any obligation or liability under the aforesaid undertaking upon the said [*trustees*], or either of them, or their or his heirs, executors, administrators or assigns, in case the said deeds and writings, or any of them, shall be destroyed, lost, cancelled, defaced or injured while the same are in the possession of the solicitors, bankers, or agents of the said [*trustees*] or either of them, or of other persons intrusted with the custody thereof by them or him, and not in the actual possession of the said [*trustees*] or either of them. AS WITNESS, &c. (*c*).

V. Acknowledgment, &c. by Trustees.

Qualified undertaking.

VI. *ACKNOWLEDGMENT on a Sale by Auction by the* VENDOR, *as to Deeds, &c. retained by him and by the* PURCHASER *of the largest Lot, as to Deeds, &c. retained by him, to the right of the* PURCHASER *of another Lot to* PRODUCTION *of Documents, and* UNDERTAKING *for the safe* CUSTODY *thereof.*

MEMORANDUM.

WHEREAS on the ——— day of ———, 18—, [*vendors*] of, &c., being seised in fee simple in possession [*or* tenant for life in possession under the will, &c., *or as the case may be*], of certain lands and hereditaments situate in the parish of ———, in the county of ———, lately contracted for the sale to [*purchaser No.* 1], of part thereof, that is to say, a messuage or farm house and farm known as ——— farm, and containing ——— acres or thereabouts, in fee simple in possession at the price of £ ———, and also contracted for

Recitals; of agreements for sales, and as to possession of deeds (*d*);

(*c*) The effect of the form of qualified undertaking, above suggested, would be that if a trustee keeps the documents in his own possession he is responsible for their safe custody, but he ceases to be so on depositing them with his banker or solicitor.

(*d*) All specific reference to the sale by auction should, if possible, be avoided, so that notice of the particulars and conditions of sale may not be put upon the title. See on this point sub tit. PURCHASES. Recitals of a sale by auction will be found in the next Precedent.

VI. Acknowledgment, &c. on Sales by Auction.

the sale of other part of the said lands and hereditaments to [*purchaser No.* 2], and upon the contracts for the said sales it was agreed that such of the muniments of title as should relate to property comprised in the said sales respectively, and also to property not therein comprised, should be retained by the vendor, who should give to the purchasers the usual acknowledgment of their respective rights to the production of the muniments so retained by him as aforesaid, and to delivery of copies thereof, and undertaking for the safe custody thereof; and it was also agreed that such of the muniments of title as should relate exclusively to property comprised in the said sales, should after the completion of the said sales be handed over to the said [*purchaser No.* 2], who should be entitled to receive and thenceforth retain possession thereof, and should give to the said [*purchaser No.* 1] the usual acknowledgment of his right to production of the documents so received and retained by him as aforesaid and to delivery of copies thereof, and undertaking for the safe custody thereof:

of completion of purchase;

And whereas the hereditaments comprised in the said contracts of sale respectively have been duly conveyed to the said several purchasers thereof by two indentures dated the ——— day of ———, 18 —, and the ——— day of ———, 18 —, respectively:

that documents in Sched. 1 are retained by vendor;

And whereas the several deeds and muniments of title specified in the first schedule hereunder written relate to the hereditaments comprised in the said property so purchased by the said [*purchaser No.* 1] as aforesaid, and also to property of the said [*vendor*] not comprised in the said sale, and the said [*vendor*] accordingly retains possession of the same deeds and muniments of title:

that documents in Sched. 2 are retained by purchaser of largest lot.

And whereas the deeds and muniments of title specified in the second schedule hereunder written relate exclusively to the hereditaments comprised in the said sales, but are common to the said property purchased by the said [*purchaser No.* 1] and also to the said property purchased by the said [*purchaser No.* 2], and such last-mentioned deeds and muniments of title have been accordingly delivered to the said [*purchaser No.* 2], who now retains possession thereof:

Acknowledgment and undertaking by vendor,

NOW THEREFORE the said [*vendor*], as to the deeds and muniments of title specified in the first schedule hereunder written, hereby acknowledges the right of the said [*purchaser No.* 1] to production and

by purchaser of largest lot.

delivery of copies of the same and undertakes for the safe custody thereof: And the said [*purchaser No.* 2], as to the

deeds and muniments of title specified in the second schedule hereunder written, hereby acknowledges the right of the said [*purchaser No.* 1], to production and delivery of copies of the same and undertakes for the safe custody thereof. As WITNESS, the hands of the said [*vendor*] and [*purchaser No.* 2]. VI. Acknowledgment, &c. on Sales by Auction.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

VII. *ACKNOWLEDGMENT on a Sale by Auction of* LEASEHOLDS *in Lots, by the* PURCHASER *of the largest Lot, to the right of the* VENDOR *in respect of a Lot unsold, to* PRODUCTION *of the Lease, and an Assignment thereof, and* UNDERTAKING *for safe* CUSTODY *of the Documents.*

MEMORANDUM.

WHEREAS on the ——— day of ——— last [*vendor*] of, &c. put up for sale in four lots certain hereditaments situate at ———, in the county of ———, and held by him under or by virtue of a lease of the same premises, dated the ——— day of ———, 18—, and made between [*parties*], and under or by virtue of an assignment of the said lease dated the ——— day of ———, 18—, and made between [*parties*] for the residue of a term of 99 years from the ——— day of ———, 18—, granted by the said indenture of lease: AND WHEREAS it was, among other things, provided by the conditions of such sale that if the hereditaments comprised in the first lot should be sold, the said lease and assignment should, on the completion of the sale of the same lot, be delivered to the purchaser thereof, who should give to the purchasers of the other lots, and to the vendor, in case any of the lots should remain unsold, the usual acknowledgments of their respective rights to the production and delivery of copies of the deeds aforesaid, and undertaking for safe custody thereof: AND WHEREAS [*purchaser*] was declared the purchaser of the said first lot, but the third lot remained unsold: AND WHEREAS by an indenture bearing even date with this memorandum, and made between the said [*vendor*] of the one part, Recitals; of sale by auction; of condition as to possession of deeds; of sale of largest lot; of conveyance of even date.

VII. Acknowledgment, &c. on Sale by Auction.

and the said [*purchaser*] of the other part, for the consideration therein mentioned, the said hereditaments comprised in the said first lot have been assigned and conveyed to the said [*purchaser*] to hold the same for the unexpired residue of the said term: NOW THEREFORE, the said [*purchaser*] acknowledges the right of the said [*vendor*] to the production and delivery of copies of the hereinbefore-recited indentures of lease and assignment respectively, and undertakes for the safe custody thereof. As WITNESS, &c.

Acknowledgment by purchaser.

Undertaking.

VIII. *ACKNOWLEDGMENT by a* MORTGAGEE, *on a Sale of Part of the Mortgaged Property, of the Purchaser's Right to Production of Documents, and* COVENANT *by the* MORTGAGOR *to procure the production of the Documents, and for the safe* CUSTODY *thereof, when they shall come into his possession.*

Parties.

THIS INDENTURE, made the ——— day of ———, 18—, BETWEEN [*mortgagee*], of, &c., of the first part, [*mortgagor*], of, &c., of the second part, and [*purchaser*], of, &c., of the third part: WHEREAS by an indenture, dated the ——— day of ———, 18—, and made by way of statutory mortgage between the said [*mortgagor*], of the one part, and the said [*mortgagee*], of the other part, certain hereditaments therein described, and situate at ——— in the county of ———, were conveyed to the use of the said [*mortgagee*] in fee simple, for securing payment of the sum of £———, with interest thereon at the rate of £4 per centum per annum: AND WHEREAS by an indenture bearing even date with and executed before the execution of these presents, and made between the said [*mortgagee*], of the first part, the said [*mortgagor*], of the second part, and the said [*purchaser*], of the other part, certain hereditaments situate at ——— aforesaid, particularly described in the indenture now in recital, and being part of the hereditaments comprised in the said indenture of mortgage, have been conveyed to the use of the said

Recitals of mortgage;

of sale of lands comprised in the mortgage;

VIII. Acknowledgment by Mortgagee, &c.

[*purchaser*] in fee simple in possession, free from incumbrances, and particularly from the said mortgage debt of £———, and all interest thereon, and all claims and demands in respect thereof: And whereas the deeds and writings specified in the schedule hereunder written relate not only to the premises conveyed by the said indenture of even date herewith, but also to other hereditaments which still remain subject to the hereinbefore-recited indenture of mortgage; And it has been agreed between the parties hereto that the said [*mortgagee*] shall give the acknowledgment hereinafter contained, and that the said [*mortgagor*] shall enter into the covenants on his part also hereinafter contained: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the premises, the said [*mortgagee*] hereby acknowledges the right of the said [*purchaser*] to production and delivery of copies of the several deeds and writings specified in the schedule hereunder written: And the said [*mortgagor*] hereby covenants with the said [*purchaser*] that he the said [*mortgagor*] will, at the request of the said [*purchaser*], or of any person or persons lawfully claiming under him execute and do all such acts and things as by him or them may reasonably be required for procuring the production and delivery of copies of the said deeds and writings by the said [*mortgagee*], or any other person having possession or control thereof from time to time; And also that, when and so soon hereafter as the said deeds and writings shall come into the possession or control of him the said [*mortgagor*], or any person or persons lawfully claiming under him, he or they will thenceforth keep the same deeds and writings safe, whole, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

of agreement as to possession of deeds.

Acknowledgment by mortgagee.

Covenant by mortgagor.

In witness, &c. (*d*).

The Schedule above referred to.

(*d*) The acknowledgment here given by the mortgagee, who retains possession of the documents, will run with the documents, and bind them in the hands of a transferee of the mortgage, or of the mortgagor, on payment off of the mortgage. A mortgagor is not in a position to give an undertaking, inasmuch as he does not "retain possession" of the documents; he should, therefore, enter into a covenant as in the text. A deed stamp of 10*s.* will be required.

Mortgagor cannot give acknowledgment.

Stamp.

IX. *ACKNOWLEDGMENT by a* MORTGAGEE *to a* MORTGAGOR *of the Receipt of* TITLE DEEDS (*e*).

Schedule of documents.

A SCHEDULE of the several deeds and writings this day delivered by [*mortgagor*], of, &c., to [*mortgagee*], of, &c., upon the execution of a mortgage of a certain leasehold messuage and premises situate at ———, in the parish of ———, in the county of ———, for securing the payment by the said [*mortgagor*] of the sum of £——— and interest, at £— per centum per annum, unto the said [*mortgagee*].

11th February, 1872.—Indenture of Lease made between A. B., of, &c., of the one part, and C. D., of, &c., of the other part.

22nd March, 1881.—Indenture of Assignment made between the said C. D., of the one part, and the said [*mortgagor*] of the other part.

15th October, 1883.—Indenture of Mortgage made between the said [*mortgagor*] of the one part, and the said [*mortgagee*] of the other part, for securing the payment of a sum of £———, and interest at £4 per centum per annum.

Acknowledgment of receipt.

I HEREBY ACKNOWLEDGE the several deeds and writings above mentioned were this day received by me, and are now retained by me in my possession (*f*). WITNESS my hand this ——— day of ———, 18—.

[*Mortgagee's signature.*]

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44 & 45 Vict. c. 41, s. 16. Power for mortgagor to inspect title-deeds.

(*e*) By sect. 16 of the Conveyancing Act, 1881, "A mortgagor, as long as his right to redeem subsists, shall by virtue of this Act be entitled from time to time, at reasonable times, at his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies, or abstracts of, or extracts from, the documents of title relating to the mortgaged property in the custody or power of the mortgagee."

Bailment.

(*f*) It is now understood, that acceptance of goods to be kept *generally*, is merely an undertaking to keep them as the party receiving keeps his own: Hargr. Co. Litt. 89 a, (9). And the notion of Lord Coke, "*to keep* and *to keep safely*, are one and the same thing" (Co. Litt. 89 a): *Southcote's case*, 4 Rep. 83 b, was denied to be law by the whole court, in the time of Chief Justice *Holt*: *Coggs* v. *Bernard*, 2 Ld. Raym. 911, 912; *S. C.*, 1 Smith's L. C. 199. A depositary is responsible only for *gross* neglect; or, in other words, for a *violation of good faith*: and a depositary, whose character is known to his depositor, shall not answer for *mere neglect*, if he take *no better care of his own goods*, and *they also* be spoiled or destroyed. If such a deposit of title deeds as the above, without any express stipulation as to the degree of care, be looked upon as a pawn or pledge, a *pawnee* is

X. *ACKNOWLEDGMENT of* SATISFACTION *as to a Registered* JUDGMENT (*g*).

SATISFACTION is acknowledged between A. B. and C. D. as to a [*here insert the judgment, lis pendens, &c.*], dated the ——— day of ———, 18—, for the sum of £———, a memorandum of which said [*judgment, &c.*] was left with the Registrar of Judgments at the Central Office of the Supreme Court of Judicature, on the ——— day of ———, 18—, to affect the estate of ———, and [*if so*] on the writ of execution thereon, dated the ——— day of ———, 18—,

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answerable only for *ordinary* neglect: *Vere* v. *Smith*, 1 Vent. 121. And if the pawnee, notwithstanding ordinary care, loses any of several articles pledged, he has a right to retain the residue for the *whole* of his debt: *Ratcliffe* v. *Davies*, Yelv. 178. But all bailees become responsible for losses by *casualty* or *violence*, *after* their *refusal* to return the things bailed, on a *lawful demand*: Jones on Bailments, 42, 120, 121; Noy's Maxims, 215, 216, 9th ed.; see also Story on Bailments, §§ 63, 64, 7th ed. The degree of care with which the bailee keeps his own goods is immaterial, except as an aid towards judging whether he has been guilty of gross neglect in respect of the goods deposited; the rule being that a gratuitous bailee is, in the absence of any stipulation to the contrary, liable for gross negligence, and for gross negligence only: *Doorman* v. *Jenkins*, 2 A. & E. 256; *S. C.*, 4 Nev. & M. 170; *Beauchamp* v. *Powley*, 1 M. & Rob. 38; *Finucane* v. *Small*, 1 Esp. 315; *Gibbin* v. *MacMullen*, L. R., 2 P. C. 317; *Trefftz* v. *Canelli*, L. R., 4 P. C. 277; see also *Chanter* v. *Money*, 12 Ir. C. L. 161. If the situation or profession of a party who gratuitously undertakes to do an act is such as to imply that he has skill in respect of that act, his omission to exercise that skill is in him *gross negligence*, although it would not be so in an ordinary person. Per Lord *Loughborough*, *Shiells* v. *Blackburne*, 1 H. Bl. 158. When the bailment is for reward, the *bailee* is bound to take the utmost care of the property: *Re United Service Co.*, *Johnson's Claim*, L. R., 6 Ch. 212. Where it is for the benefit of both parties, as in the case of a hiring, depositing with an artisan, &c., he must use *ordinary* care: *Dean* v. *Keate*, 3 Camp. 4; *Bringloe* v. *Morrice*, 3 Salk. 271; *Vere* v. *Smith*, 1 Vent. 121; *Clarke* v. *Earnshaw*, 1 Gow, 30; *Leck* v. *Maestaer*, 1 Camp. 138.

Liability of bailee for loss.

See generally, on the question of bailment, the notes to the case of *Coggs* v. *Bernard*, in Sm. L. C. 199.

Where the chattel is lost out of the possession of a simple bailee without reward, it may be recovered in trover by either the owner or the bailee: *Nicholls* v. *Bastard*, 2 Cr., M. & R., Ex. 659.

Rights of owner and bailee after loss.

As to the loss of mortgage or title deeds by a mortgagee, *vide post*, sub tit. MORTGAGES.

(*g*) This is the statutory form appended to the stat. 23 & 24 Vict. c. 115, as to which see *ante*, p. 107, sub tit. ABSTRACTS.

X. Acknowledgment of Satisfaction of Judgment.

a memorandum of which was left with the said Registrar on the ——— day of ———, 18—.

And ——— [*or*, the executor or administrator of] do hereby expressly nominate and appoint ———, of ———, solicitor [*or*, attorney-at-law], to witness and attest the execution of this acknowledgment of satisfaction.

Attestation(*h*)

Signed by the said ———, in the presence of me, the undersigned, a solicitor of the Supreme Court, and I hereby declare myself to be the solicitor for and on behalf of the said ———, expressly named by ———, and attending at ———, request to inform him of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by ———), and I also declare that I subscribe my name as witness hereto as such solicitor.

} A. B. above named [*or*, F. G., executor or administrator of A. B.], dated the ——— day of ———, 18—.

XI. *ACKNOWLEDGMENT of* TITLE *so as to bar the* STATUTES *of* LIMITATIONS (*i*).

I [*occupant*], of, &c., do hereby admit and declare that I am now in possession [*or* in receipt of the rents and profits of], all that messuage, &c. [*describe parcels*], with the appurtenances, situate at ——— in the county of ———, by the sufferance and permission of ———, of ———, esquire, and subject to the title of the said ———, under whom I now hold the same.

Dated this ——— day of ———, 18—.

To ———, esquire. [*Signature of Occupant.*]

(*h*) Where the plaintiff is a solicitor it is not necessary for another solicitor to attest the acknowledgment: the attestation may be by his clerk or any other person.

(*i*) No stamp is required: *Barry* v. *Goodman*, 2 M. & W. 768.

AGREEMENTS.

PRELIMINARY DISSERTATION.

Sect. 1.—Of Parol Agreements and the Statute of Frauds.

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Statute of Frauds: to what it extends.

Sect 1.—Of Parol Agreements and the Statute of Frauds.

I.—Enactments of the Statute of Frauds.

The Statute of Frauds, 29 Car. 2, c. 3 (*a*), enacts that:

Parol leases and interests of freehold, &c., shall have the force of estates at will only.

Sect. 1. "All leases, estates of freehold, or terms of years, or any uncertain (*b*) interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, *or* by parol *and* not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized *by writing*, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding" (*c*).

Sects. 2 and 3 relate to parol leases not exceeding three years, and parol surrenders of leases: *vide infra*, tit. Leases.

No action against executors, &c., upon a special promise, or upon any agreement or contract for sale of lands,

Sect. 4. "No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage (*d*): or

(*a*) This celebrated statute owes its origin to Lord *Nottingham*, and seems in its progress to have received some touches from the hands of Sir *M. Hale*, and Sir *Leoline Jenkins*. See *Ash* v. *Abdy*, 3 Swanst. 664; and *Whin* v. *Warlters*, 5 East, at p. 17.

(*b*) That is to say, uncertain as to duration in point of time: *Wood* v. *Lake*, Say, 3; 13 M. & W. 348.

(*c*) Where a canal Act authorized the owners of land, set out for the canal, to contract for, sell, and convey the land to the company; and that all such contracts, &c. should be valid in law, any law or statute to the contrary notwithstanding, and that all contracts, &c. should be enrolled; and by a subsequent section, that, on payment of the sum agreed for or assessed, the lands and the fee-simple and inheritance thereof should be thenceforth vested in the company, it was considered that a conveyance in writing was not dispensed with by the Act: *Doe* d. *Robins* v. *Warwick and Birmingham Canal Co.*, 2 Scott, 717; *Earl of Harborough* v. *Shardlow*, 7 M. & W. 87.

(*d*) This clause does not apply to mutual promises of marriage: *Cork* v. *Baker*, 1 Str. 34; *Harrison* v. *Cage*, Lord Raym. 386 *King* v. *Gillett*, 7 M. & W. 55. A parol agreement to

upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them (*e*): or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, *or some other person thereunto by him lawfully authorized.*

Statute of Frauds: to what it extends.

&c., unless agreement, &c. be in writing and signed.

Sects. 5 and 6 relate to the making and revoking of wills. (Repealed, except as to wills made before 1st January, 1838, 1 Vict. c. 26, ss. 2, 34.)

Sect. 7. "All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be *manifested and proved* by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Declarations or creations of trusts of lands to be in writing signed.

Sect. 8. "Where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been had this statute not been made."

Proviso for trusts arising, transferred, or extinguished by implication of law.

Sect. 9. "All grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect."

Assignments of trusts shall be in writing.

Sects. 10 and 11 relate to the payment of debts out of trust estates. *Vide infra*, tit. MORTGAGES.

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make a settlement in consideration of marriage is void: *Randall* v. *Morgan*, 12 Ves. at p. 73; see also *Caton* v. *Caton*, L. R., 2 H. L. 127. But a signed letter stating the terms of the intended settlement is sufficient to take the case out of the statute: *Bird* v. *Blosse*, 2 Vent. 361; *Wankford* v. *Fotherley*, 2 Vern. 322; see also *Hammersley* v. *Baron de Biel*, 12 Cl. & F. 45.

(*e*) This section extends to an assignment as well as to interests created *de novo* out of an estate. *Anon.*, 1 Vent. 361. Where A., having verbally agreed with B. for the purchase of houses, agreed by writing with C. to sell him the benefit of the bargain for 40*l.*, and C. obtained a conveyance, it was held that A. could recover the 40*l.*; the transfer of the bargain, though it was one that was not enforceable, being a sufficient consideration: *Seaman* v. *Price*, 10 Moore, 34; see also *Cocking* v. *Ward*, 1 C. B. 858; *Kelly* v. *Webster*, 12 C. B. 283; *Sanderson* v. *Graves*, L. R., 10 Ex. 234.

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Sect. 12 relates to estates *pur autre vie*. (Repealed, 1 Vict. c. 26.)

Sects 13, 14, 15, and 16 relate to judgments, &c.: *infra*, tit. MORTGAGES.

What contracts for the sale of goods required to be in writing.

Sect. 17. "No contract for the sale of any goods, wares, and merchandizes, for the *price* (*f*) of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest (*g*) to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, *or their agents thereunto lawfully authorized*."

Sect. 18 relates to recognizances.

Sect. 19, 20, 21, to nuncupative wills. (Repealed 1 Vict. c. 26.)

Sect. 22. Revocation of wills. (Repealed 1 Vict. c. 26.)

Sect. 23. Soldiers' and mariners' wills.

Sect. 24. Jurisdiction of the Ecclesiastical Courts.

Sect. 25. Husbands not to be obliged to distribute the estate of their wives (*h*).

By the stat. 9 Geo. 4, c. 14, intituled An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements, it is enacted (after reciting the Acts 21 Jac. 1, c. 16, and 10 Car. 1, sess. 2, c. 6 (*i*)—

In actions of debt or upon the case grounded upon contract no acknowledgment or promise shall be deemed

Sect. 1. "In actions of debt or upon the case grounded upon any simple contract no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the

(*f*) See stat. 9 Geo. 4, c. 14, s. 7, *infra*, p. 276.

(*g*) See *Blenkinsop* v. *Clayton*, 7 Taunt. 597; 1 J. B. Moore, 328.

(*h*) Sects. 16—25 become sects. 15—24 in the Revised Statutes, but sect. 17 is so well known under that title that it is thought better to leave them as above.

(*i*) 10 Car. 1, sess. 2, c. 6, was the Irish Act. Sects. 1—4 of the 9 Geo. 4, c. 14, are repealed so far as they relate to personal actions or actions of ejectment in the superior courts of law in Ireland (16 & 17 Vict. c. 113, s. 3), but are practically re-enacted by sects. 24, 25, 26 of that Act.

benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executors, or administrators, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever (*k*). Provided also, that in actions to be commenced against two or more of such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts, or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise judgment may be given, and costs allowed, for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

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sufficient evidence of a contract, unless it be a writing signed by the party chargeable.

Acknowledgment by joint contractor not to bind the others.

Effect of part-payment not to be altered.

Plaintiff may recover against one joint contractor though he may fail against the others.

Sect. 2. "If any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited Acts or this Act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

If defendant plead in abatement that any other person ought to be jointly sued, and it appears that the remedy against such person is barred by recited Acts or this Act, the issue shall be found against the party pleading.

Sect. 3. "No indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

Indorsements of payment by party to whom payment is made shall not take the case out of recited Acts.

Sect. 4. "The said recited Acts, and this Act, shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

Recited Acts and this Act shall apply to simple contract debts alleged by way of set-off.

(*k*) See *Waugh* v. *Cope*, 6 Mee. & W. 824, and cases there cited.

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Sect. 5 relates to the confirmation of promises by infants (*l*).

Action not maintainable on representation of character, &c., unless they be in writing, signed by the party chargeable.

Sect. 6. "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (*m*), unless such representation or assurance be made in writing signed by the party to be charged therewith (*n*).

Clause in Statute of Frauds extended to contracts for sale, &c. of goods, although delivery be not intended to be made immediately.

Sect. 7 extends the clause in the Statute of Frauds (sect. 17, *supra*, p. 274), and a similar clause in the Irish statute, 7 Will. 3, c. 12 (repealed by stat. 23 & 24 Vict. c. 154),—

"To all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

Exemption of stamps.

Sect. 8. "No memorandum or other writing, made necessary by this Act, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps."

Sect. 9. Act not to extend to Scotland.

Sect. 10. Act to commence on 1st January, 1829.

II.—To what Matters the Statute extends.

What matters within the Statute of Frauds.

The first section of the Statute of Frauds applies to estates and interests in land actually made or

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37 & 38 Vict. c. 62, s. 2. No action to be brought on ratification of infants' contract.

(*l*) This section is virtually repealed by the Infants' Relief Act, 1874, which enacts (sect. 2) that, "No action shall be brought, whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy or upon any ratification made after full age of any promise, or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

(*m*) The Act is so printed: the word "credit" should probably be in this place instead of preceding the word "money." See the observations of *Parke*, B., and Lord *Abinger*, C. B., in *Lyde* v. *Barnard*, 1 M. & W. 115, 123.

(*n*) This clause was fully discussed in *Lyde* v. *Barnard*, 1 Mee. & W. 101.

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created by parol, while the fourth section applies to contracts or sales of lands, or any interest in or concerning them (*o*). Between them, therefore, every agreement for an interest in land, and every interest executory or executed in land, except such as are excepted by the second section, appear to be included (*p*). In the case of *Crosby* v. *Wadsworth*, 6 East, 602, it was held that an agreement for the purchase of a standing crop of grass was a contract for the sale of an interest in or concerning land within the fourth section, inasmuch as it conferred an exclusive right to the vesture of the land for a limited time, and for a specified purpose.

Crosby v. *Wadsworth.*

Although an agreement within the fourth section cannot be enforced by either party, it is not avoided by the statute, *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Lavery* v. *Turley*, 30 L. J., Ex. 49; and it may operate so far as to shelter the grantee from liability as a trespasser for any acts done under it before it is countermanded: *Carrington* v. *Roots*, 2 M. & W. 248. There the contract was the same as in *Crosby* v. *Wadsworth*, and the action was brought against the seller for a trespass in taking away the plaintiff's horse and cart which he had brought to the close for the purpose of carrying away the grass. The plaintiff had not paid down part of the price

Carrington v. *Roots.*

(*o*) It was held by Lord *Ellenborough*, in *Wain* v. *Warlters*, 5 East, 10, that the word *promise*, which also occurs in this section, does not mean a bare undertaking on one side, but an agreement between two parties, supported by a mutual consideration; and this construction, though once doubted, is now fully established. See *Marshall* v. *Lynn*, 6 M. & W. 109, and *infra*, p. 325.

(*p*) As to sales by auction, and sales by order of the court, vide *post*, p. 295. Contracts by deed do not seem to be within the Act, it being sufficient if such instruments are sealed and delivered, without signature: *Cherry* v. *Heming*, 4 Exch. 631. As to leases under seal, see *Cooch* v. *Goodman*, 2 Q. B. 580; *Aveline* v. *Whisson*, 4 Man. & Gr. 801.

A partnership constituted without writing is valid, *Essex* v. *Essex*, 20 Beav. 442; and where a partnership is shown to exist parol evidence may be given that its property consists in land: *Foster* v. *Hale*, 5 Ves. 308; *Dale* v. *Hamilton*, 2 Phil. 266; but see *Caddick* v. *Skidmore*, 2 De G. & J. 52; and see Lindley on Partnership, p. 90.

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beforehand according to the terms of the agreement. It was held, that the plaintiff could not sustain his action, that being an incidental and collateral mode of enforcing the contract; and *Parke*, B., said, "I think the right interpretation of the fourth section is this, that an agreement which cannot be enforced on either side is, as a contract, void altogether; no doubt it may have, as an agreement in fact, some operation in communicating a license; and that appears to be the whole effect of the decision in *Crosby* v. *Wadsworth*. Here no doubt the plaintiff might have pleaded a license, but the defendant would have replied that it was countermanded, and the plaintiff could not have succeeded on that issue." See 5 B. & Cr. 232.

Effect of parol contract in giving a prior equity.

So a parol contract within the fourth section, being binding on the conscience, may be used as an equitable defence. Thus it has been held that, if a person by parol contracts to sell an estate to A., and then by writing sells the same estate to B., and afterwards in pursuance of the first contract conveys to A., who has notice of the second contract, B. cannot compel A. to convey the estate to him, for the statute only prevents the enforcement of the contract, and not the use of it for defensive purposes, the conscience being equally bound notwithstanding the statute; and A., having thus a prior equity under his parol contract, notice of the subsequent sale to B. was immaterial: *Dawson* v. *Ellis*, 1 Jac. & W. 524; see also *Lavery* v. *Turley*, 30 L. J., Ex. 49. So it seems that though a parol undertaking by an attorney cannot be enforced by *action*, the statute does not prevent the court from enforcing it by exercising its summary jurisdiction over the attorney or the officer of the court: *In re Graves*, cit. *Evans* v. *Duncombe*, 1 Cr. & J. 372. So a contract for a hiring not to be completed within a year, though not enforceable, may be a good hiring for the purpose of conferring a settlement. Per *Bayley*, J., in *Bracegirdle* v. *Heald*, 1 B. & Al. 727.

Enforcement of parol undertaking against attorney.

Settlement by parol hiring.

Whether a parol license is within the statute.

A distinction has been taken between an *interest* in or concerning land, and a mere *license*. Thus, in *Wood* v. *Lake*, Sayer, 3, the defendant had agreed

by parol that the plaintiff should have the liberty of stacking coals upon part of a close belonging to the defendant for the term of seven years, and that during that period he should have the *sole* use of that part of the close; and the plaintiff, after three years' enjoyment, being excluded from the close, brought an action upon the case: it was held that the agreement was good for seven years.

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Case of *Wood* v. *Lake.*

In the case of *Winter* v. *Brockwell*, 8 East, 308, which was an action for a nuisance by obstruction of light and air, caused by the erection of a skylight *over the defendant's own ground*, it was held a good defence, that the plaintiff had given the defendant a parol license to erect the skylight. The court relied on the case of *Webb* v. *Paternoster*, 2 Roll. Rep. 143, 152, where it is laid down that a license executed is not countermandable, but only a license executory: *Wallis* v. *Harrison*, 4 M. & W. 538. An objection that the license was within the Statute of Frauds, as relating to an interest in land, was overruled at the trial. The license here, it will be observed, was to do an act *on the licensee's own land*, so that the case is properly an authority to show that an easement may be waived by parol.

Case of *Winter* v. *Brockwell.* License to do an act on the *licensee's* land.

In *Tayler* v. *Waters*, 7 Taunt. 374, the lessee of an opera house having assigned all his interest in the theatre to trustees, but continuing to manage the concern himself, by deed granted six tickets of admission for twenty-one years or seasons, to J. G., his executors, administrators, and assigns. The action was brought by the assignee of one of these tickets against the acting manager for the trustees, for refusing him admission. It was objected that this was an interest in land which could only be granted by deed, and that the grant to J. G. was void as not being founded on an authority under seal from the trustees, but the objection was overruled.

Case of *Tayler* v. *Waters.* Admission to a theatre.

In *Wood* v. *Manley*, 11 Ad. & El. 34, the ricks of hay and oats belonging to the plaintiff had been sold by another to the defendant, and one of the conditions of sale (to which it was found that the plaintiff had assented) was that the purchasers might

Wood v. *Manley.* License to leave purchased chattels on the land.

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leave the hay and corn on the premises until Lady-day if they required it, and were to have the use of the plaintiff's barn whenever they pleased to thrash out the corn, and to enter on the premises as often as they thought proper to remove such hay and corn. The action was brought for a trespass by the defendant's entry and removal of the hay after the plaintiff had given him notice not to do so. It was held on the authority of *Tayler* v. *Waters*, that as the inducement held out to buy at the auction was, that the hay should remain on the premises, the license was irrevocable, being executed just as much as in that case. "The other cases upon the subject," added *Patteson*, J., "certainly differ, and I do not go the length of saying that because a party has bought goods on the land of A., he has the right to free entry to take them away, but here the license is part of the very contract." *Coleridge*, J., thought the license irrevocable on the principle that when, in consequence of the permission given by a party, anything is done upon the reliance of its continuance, the license becomes binding on the party granting it. As to this, see also *Mason* v. *Hill*, 2 Nev. & M. at p. 757; *Wallis* v. *Harrison*, 4 M. & W. 538; *Cocker* v. *Cowper*, 1 Cr., M. & R. 418; *infra*.

License, when revocable.

Remarks on the authorities as to parol license.

These are the only cases in which parol licenses relating to land have been held not to be within the Statute of Frauds. The dicta of Lord *Ellenborough*, indeed, in two cases of *Rex* v. *The Inhabitants of Standon*, 2 Mau. & S. 467, and *Rex* v. *The Inhabitants of Horndon-on-the-Hill*, 4 Ib. at p. 565, seem to attribute some effect to such licenses, but no definite opinion was expressed. The first of the cases stated above (*Wood* v. *Lake*) was by much the strongest; and it does seem very extraordinary, that the court should there have considered a grant of an exclusive license to occupy land for seven years, not to be a grant of an interest in land, within the Statute of Frauds. That case appears to be overruled by subsequent decisions, which have settled that an easement out of land, even for a definite term, cannot be granted without deed.

Thus a grant of a right of sporting for a term

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Doctrine that an easement cannot be granted without deed.

cannot be made except by deed: *Bird* v. *Higginson*, 4 Nev. & M. 505; see also *Webber* v. *Lee*, 9 Q. B. D. 315. In *Hewlins* v. *Shippam*, 5 B. & Cr. 221, a parol agreement was made between A. and B., that A., who had rebuilt an inn, should be at liberty to construct a drain through the adjoining premises of B., in consideration of A.'s agreeing to raise the chimneys, and pave the yard of B.'s premises, which was done, and the drain constructed. On an action for stopping the drain, it was held, that the plaintiff could not recover, the grant not having been made by deed. The Court held, that the grant in question was of a freehold interest, but expressed a decided opinion, that the rule applied equally to an easement for a term of years: *Bayley*, J., distinguished the case of *Winter* v. *Brockwell*, 8 East, 309, observing, "that that was not the case of a grant of an easement, to be used on the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it: *Webb* v. *Paternoster*, *Wood* v. *Lake*, and *Tayler* v. *Waters*, were not cases of freehold interest; *and in none of them was the objection taken, that the right lay in grant, and therefore could not pass wthout deed.* These, therefore, cannot be considered as authorities upon the point." The decision in *Wood* v. *Lake*, must accordingly be considered to be overruled. See *Wallis* v. *Harrison*, 4 M. & W. 538; *Williams* v. *Morris*, 8 M. & W. 488; *Cocker* v. *Cowper*, 1 Cr., M. & R. 418. In *Cocker* v. *Cowper*, the circumstances were similar to those in *Hewlins* v. *Shippam*, except that upon the construction of the license it would appear to have been made for a term of years. No notice, however, was taken of that distinction, and *Hewlins* v. *Shippam* was held to apply.

The authorities on this subject were fully discussed in *Wood* v. *Leadbitter*, 13 M. & W. 838; 14 L. J., Ex. 161. The facts in that case were as follows:— Lord Eglinton, being steward of the Doncaster races, tickets were sold at a guinea each, which were understood to entitle the holders to admission to the grand stand and enclosure during the races; they

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were issued by Lord Eglinton's sanction, but were not signed or sealed by him; it was held that the tickets conferred merely a revocable license (*q*), and that accordingly it was lawful for Lord Eglinton, without returning the guinea, or assigning any reason, to order any ticket-holder to quit the stand and inclosure, and on his refusal, after a reasonable time, to cause him to be put out: see also *Adams* v. *Andrews*, 15 Q. B. 284; *Ruffey* v. *Henderson*, 21 L. J., Q. B. 49. See further, as to the nature of the interest conferred by a license, *infra*, tit. LEASES.

Assignment of dower.

Dower is an estate in land, which arises by act of law, and therefore it seems that an assignment of dower is not within the statute; for the assignment does not "make or create" the estate. Before the statute, there needed neither livery of seisin nor writing to any assignment of dower, because it is due of common right: Co. Litt. 34. See *Rowe* v. *Power*, 2 B. & P. N. R., at p. 34.

Sale of standing crops, fixtures, &c.

Another question of frequent occurrence, and closely related to that which has just been discussed, is, whether an agreement for the sale of standing crops, fixtures, &c. is to be considered as an agreement respecting an interest in land, within the 4th section, or an agreement for the sale of goods, wares, or merchandize, within the 17th section; and upon this the authorities are not quite accordant.

It seems to be the doctrine of the more recent cases, that contracts for the sale of growing crops, of a nature which makes them emblements, and chattels seizable under a *fieri facias*, are not within the 4th section, and therefore are within the 17th; and this whether the crop is ripe at the date of the contract or not, provided it be in existence at the time (*r*), and whether liberty is given to the buyer

(*q*) A mere licensee is entitled to reasonable notice, according to the circumstances of the particular case, before revocation of the license: *Cornish* v. *Stubbs*, L. R., 5 C. P. 334; *Mellor* v. *Watkins*, L. R., 9 Q. B. 400.

(*r*) As to this, however, see now stat. 9 Geo. 4, c. 14, s. 7, *ante*, p. 276, and the case of *Hibblewhite* v. *M'Morine*, 5 M. & W. 462, in which the doctrine of Lord *Tenterden* in *Bryan* v. *Lewis*, 1 Ry. & M. 386, that a man cannot contract for the sale of goods

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to come on the land, and gather the crop himself, or not. But this distinction does not appear to have been thought of in the earlier authorities. The cases are as follows:—

Anon. 1 Ld. Raym. 182.

In an *Anonymous Case*, 1 Ld. Raym. 182, it was held, at *Nisi Prius*, that a sale of timber growing upon the land might be by parol, because it was but a bare chattel. This case is clearly overruled by the subsequent authorities. See *Teall* v. *Auty*, 2 Br. & B. 101; *Scovell* v. *Boxall*, 1 Y. & Jer. 396.

Poulter v. *Killingbeck*. Agreement for delivery of crops in lieu of rent.

In *Poulter* v. *Killingbeck*, 1 Bos. & P. 397, the plaintiff made a verbal agreement to let land to the defendant, who was to cultivate it for two successive crops, and in lieu of rent to allow the plaintiff a moiety of the crops. While the crops of the second year were in the ground, they were valued for both parties, and the action was brought in *indebitatus assumpsit* for a moiety of the value so ascertained. It was held, that the appraisement having been made, the agreement was executed, and the form of the action was right; and *Buller*, J., said: "With respect to the point made at the trial on the Statute of Frauds, the agreement does not relate to any interest in the land, which remains altogether unaltered by the arrangement concerning the crops." As the case was decided, however, the point did not arise upon the original agreement, and the dictum of *Buller*, J., seems to be inconsistent with the more recent case of *Earl Falmouth* v. *Thomas*, 1 C. & M. 105; 3 B. & Cr. 357; *infra*, p. 288.

Waddington v. *Bristow*. Sale of next year's crop of hops to be delivered off the land by the seller.

In *Waddington* v. *Bristow*, 2 Bos. & P. 452, there was a written contract for the sale of next year's crop of hops on the land, at so much per hundredweight, to be delivered in pockets at W——. No time was named, the custom in such cases being to deliver within a reasonable time after the hops are picked and dried; and it was held, that the agreement was a contract for a sale of an interest in land.

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which he has not possession of at the time of the bargain, and no reasonable expectation of receiving, was overruled. The principle seems to apply to a sale of goods not in existence.

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In *Crosby* v. *Wadsworth*, 6 East, 602, a contract for a crop of grass to be cut by the purchaser, was held to be within the 4th section, "the crop being at the time of the bargain (*s*) an unsevered portion of the freehold, and not moveable goods, or personal chattels."

Crosby v. *Wadsworth.* Sale of grass to be cut by the purchaser.

Parker v. *Staniland.* Sale of potatoes to be dug *by the vendor immediately.*

In *Parker* v. *Staniland*, 11 East, 362, the owner of a close, cropped with potatoes, contracted to sell the potatoes to the defendant at so much per sack, the defendant to dig them immediately. Part were dug accordingly, the remainder were left in the ground, and spoiled by the frost, and for the value of these the action was brought. It was held, that the 4th section did not apply: the Court seeming to rely mainly on the circumstance that the crop was to be taken immediately. Lord *Ellenborough*, C. J., said that here there was no further profit to be made by the land; and *Bailey*, J., observed, that in *Crosby* v. *Wadsworth*, and *Waddington* v. *Bristow*, the contracts were made for the growing crops of grass and hops, and therefore the purchasers of the crops had an intermediate interest in the land, while the crops were growing to maturity, before they were gathered; but here the land was considered as a mere warehouse for the potatoes, till the defendant could remove them, which he was to do immediately.

Emmerson v. *Heelis.* Sale of growing turnips.

In *Emmerson* v. *Heelis*, 2 Taunt. 38, a crop of growing turnips was sold by auction in lots, and the defendant purchased several lots, no single lot being above the value of 2*l.*; but the purchaser was to bring back a load of manure for every four furrows. The purchaser did not sign any agreement, but the auctioneer wrote down his name. No time was mentioned for the removal of the turnips. Lord *Mansfield*, C. J., delivered the opinion of the Court, and said, that this was a sale of an interest in land, not being distinguishable from the case of hops

(*s*) In the more recent cases, the doctrine seems to have been, on the contrary, that the nature of the subject-matter at the time of the performance of the contract must govern the construction of the agreement and determine its effect. See *Smith* v. *Surman*, 9 B. & C. 561, *infra*, p. 287.

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decided in that Court; but that the signature by the auctioneer was as agent for the purchaser, and therefore binding. The observation, that this was an interest in land, therefore, in effect amounted to no more than a dictum.

Signature by auctioneer as agent for purchaser.

In *Warwick* v. *Bruce*, 2 Mau. & S. 205, a parol agreement entered into in October, to sell all the potatoes then growing on certain land to the plaintiff, at so much per acre, to be dug and removed by the plaintiff; no time was mentioned at which the crop was to be dug. It was objected, that this being a contract for the sale of a growing crop, was within the 4th section, but Lord *Ellenborough*, C. J., said, "If this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of *Crosby* v. *Wadsworth*. But here is a contract for the sale of potatoes, at so much per acre: the potatoes are the subject-matter of sale, and whether, at the time of sale, they were covered with earth in the field or in a box, still it was a sale of a mere chattel. It falls therefore within the case of *Parker* v. *Staniland*."

Warwick v. *Bruce*.

Sale of potatoes to be dug by the buyer.

In *Teall* v. *Auty*, 2 Br. & B. 101, the Court expressed an opinion, that a parol contract, for the sale of growing poles, to be marked and felled by the seller, and removed by the buyer, was within the statute; but the poles having been afterwards severed by the seller, and taken away by the buyer, it was held, that the agreement was executed, and the seller could recover either upon a *quantum meruit*, or, if he could prove it, upon an account stated.

Teall v. *Auty*.

A vendor may recover upon a parol contract for the sale of growing timber, executed by delivery.

In *Mayfield* v. *Wadsley*, 3 B. & Cr. 357, the plaintiff gave up possession of a farm which he occupied under the defendant, and the growing crop of wheat was valued, and the plaintiff asked the defendant if he would take the wheat at 200*l*., telling him that if he did not, he should not have the farm, to which the defendant agreed. The dead stock was also separately valued to the defendant, at 40*l*. 8*s*. 6*d*.

Mayfield v. *Wadsley*.

Sale of crops on giving up possession of a farm.

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The defendant had possession, and about a fortnight before the trial acknowledged that he had paid 75*l.* on account of this money, and said he would pay no more. A verdict was found for the balance of both sums, deducting the 75*l.* A rule *nisi* for entering a nonsuit, on the ground that the agreement was within the 4th section of the Statute of Frauds, and therefore not set up by part performance, was discharged. It was held that the contract for the sale of the wheat was distinct from that for the occupation of the farm, and not within the 4th section.

Evans v. *Roberts*.

Sale of a "cover" of potatoes to be turned up by the seller.

In *Evans* v. *Roberts*, 5 B. & Cr. 829, an agreement, on the 25th September, for the purchase of a "cover" of potatoes then in the ground, to be turned up by the seller for 5*l.*, was held not within the 4th section. *Bayley*, J., distinguished the case from *Crosby* v. *Wadsworth*, on the ground that there the purchaser was to have possession of the land, and also because the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time, without cultivation, and does not come within the description of goods and chattels, nor can be seized as such under a *fi. fa.*, and goes to the heir, and not to the executor. But growing potatoes are emblements (*t*), and are deemed chattels by reason of their being raised with labour and manurage. They go to the executor, and may be taken under a *fi. fa.* The learned judge allowed that the cases of *Parker* v. *Staniland*, and *Warwick* v. *Bruce*, were distinguishable, as there the potatoes had ceased to grow; but the observation of Lord *Ellenborough* in the latter case applied to the present. He disagreed with the extra-judicial opinion of *Mansfield*, C. J., in *Emmerson* v. *Heelis*, and thought that case different from *Waddington* v. *Bristow*. "It has been insisted," he added, "that the right to have the potatoes

Sale of growing *emblements* not within the fourth section.

Immaterial that the crop is not ripe.

(*t*) *Emblement* properly means a corn crop, from *Embler* (modern French *Emblaver*), to sow with corn. Emblements can only be had of crops which ordinarily repay the labour bestowed within the year. See *Graves* v. *Weld*, 2 Nev. & M. 725; 5 B. & Ad. 105, and the cases there collected.

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remain in the ground, is an interest in the land; but a party entitled to emblements has the same right, and yet he is not, by virtue of that right, considered to have any interest in the land. For the land goes to the heir, but the emblements to the executor. In Tidd's Practice, 1001, it is laid down that, under a *fi. fa.*, the sheriff may sell *fructus industriales*, as corn growing, which goes to the executors; or fixtures which may be removed by the tenant; but not furnaces, or apples upon trees, which belong to the freehold, and go to the heir. *The distinction is between those things which go to the executor, and those which go to the heir.* It appears, therefore, that where it was necessary at common law to distinguish between what was land and what was not, a growing crop, produced by the labour and expense of the occupier of land, was, as the representative of that labour and expense, considered an independent chattel, not going as the land does, but in a different direction." This was the first distinct enunciation of the principle, which appears to have been followed in the subsquent cases. *Littledale*, J., was of opinion, that a sale of any growing produce of the earth (reared by labour and expense), in actual existence at the time of the contract, whether it be in a state of maturity or not, was not to be considered a sale of an interest in or concerning land within the meaning of the 4th section, but a contract for the sale of goods, wares, and merchandize, within the 17th section. This proposition is, however, regarded by Lord *Blackburn* as "exceedingly questionable:" Blackburn on Sales, 19.

Distinction between chattels real and personal.

Sale of emblements.

Any crops that go to the executor may be sold by parol, though unripe.

In *Scovell* v. *Boxall*, 1 Y. & J. 396, the plaintiff by parol purchased standing underwood, to be cut by him, and it was held, that he could not maintain trespass for cutting and carrying it away.

Scovell v. *Boxall.*

Sale of standing underwood is within the fourth section.

In *Smith* v. *Surman*, 9 B. & Cr. 561; 4 Man. & Ry. 455, an agreement for the sale of trees then in the course of being felled by the seller, and where two had actually been cut down, at so much per foot, to be removed by the buyer, was held not within the 4th section, but within the 17th, and therefore void, the price being above 10*l.*, for want of writing, or

Smith v. *Surman.*

Sale of timber to be cut by the vendor, not within the fourth section.

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part performance. *Littledale*, J., said, that where the contracting parties contemplate a sale of goods, although the subject-matter at the time does not exist in goods, but is to be converted into that state by the seller's bestowing labour on his raw material, that is within the statute. *It is sufficient, if at the completion of the contract, the subject-matter be goods, wares, and merchandize;* and he added: "if, in this case, the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land, within the meaning of the statute (*u*). The object of a party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels." The dictum of *Littledale*, J., which, as it will be observed, is directly in opposition to the decision in *Scovell* v. *Boxall*, 1 Y. & J. 396, *ante*, p. 287, was cited with approval by *Grove*, J., in the case of *Marshall* v. *Green*, 1 C. P. D. 35, where it was held that a sale at a fixed aggregate price of growing timber to be *immediately* felled by the purchaser, and removed by him, was not a contract for sale of land or any interest therein, within the 4th section of the Statute of Frauds, but was a contract for sale of goods within the 17th section.

Whether a mixed contract for the sale of chattels, and for previously doing work and labour in them, is within the 17th section.

Contract for sale of timber to be felled by the vendee.

Earl of Falmouth v. *Thomas*.

In *Earl of Falmouth* v. *Thomas*, 1 Cr. & M. 89; *S. C.*, 3 B. & Cr. 357, a parol agreement, that in consideration that the plaintiff would let a farm to the defendant for fourteen years, the defendant would take the growing crops and pay for them, and for the work, labour, and materials expended by the plaintiff on them, and for making the land ready for tillage, was held an entire contract, and within the 4th section, by reason of the agreement for the tenancy of the land, incorporated in it.

Agreement for the purchase of crops, incorporated with an agreement for the tenancy of land, held within the statute.

Sale of tenant's fixtures not within the 4th section.

In *Hallen* v. *Runder*, 1 Cr. M. & R. 267, it was held, that a parol sale to the landlord, of fixtures which were removable by the tenant, was not within

(*u*) See, however, a remark of *Bayley*, B., 1 Cr. & M. 105.

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the 4th section. The court observed, that fixtures removable by the tenant, might, even while annexed, be treated for some purposes as chattels; for instance, they might be taken under a *fi. fa.*, in like manner as growing crops, and other *fructus industriales*, which go to the executor, and to which they bear a close resemblance. This decision was followed in the recent case of *Lee* v. *Gaskell*, 1 Q. B. D. 700.

Sainsbury v. *Matthews.* Sale of an immature crop to be dug by the buyer, not within the 4th section.

In *Sainsbury* v. *Matthews*, 4 M. & W. 343, the sale was of a crop of potatoes in an immature state, to be dug by the purchaser when fully grown, and paid for at 2*s.* per sack: and it was held to be out of the 4th section. *Parke*, B., said: "This contract gives no right to the land: if a tempest had destroyed the crop in the meantime, and there had been none to deliver, the loss would clearly have fallen on the defendant [the seller]. It is only a contract for goods to be sold and delivered."

Jones v. *Flint.* Contract for agistment.

In *Jones* v. *Flint*, 2 Per. & Dav. 594; *S. C.*, 10 A. & E. 753, there was a verbal contract for the sale to the defendant of growing crops of corn and potatoes to be reaped and dug by the defendant, and the stubble afterwards, up to the 30th November. The defendant was to have all that was in the fields, including the hay grass, which he might mow if he liked; and the seller was to have the liberty of turning in two cows and a heifer, and to pay the tithe. The contract was made in August, when the crops were nearly ripe. Lord *Denman*, C. J., stated the later authorities, and observed, that the circumstance that the crops had still to derive some nutriment from the ground, did not alter their character as chattels, and that the agreement that the buyer should dig them was equally immaterial; for, under that, no more than an easement was granted to him. As to the hay grass, if the parties intended a *sale* of the grass, to be mowed and fed by the buyer, it was both on principle and authority within the 4th section; but, from all the circumstances, the plaintiff having to pay the tithe, and reserving a liberty of turning in his own cattle, it was more reasonable to consider the owner as agisting the vendor's cattle, than as having his cattle agisted by him: and on these

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grounds, without impeaching *Crosby* v. *Wadsworth*, it was held, that the contract was not within the 4th section.

Result of the cases.

The discrepancy which the authorities exhibited has rendered necessary the above detail. It is clear that some of the earlier cases cannot now be followed. Thus, the *Anonymous case*, in Lord Raymond, 182, and Lord *Mansfield's* dictum in *Emmerson* v. *Heelis*, have been repeatedly overruled. As regards the conclusion to be arrived at, Sir Edward Vaughan Williams lays down the following propositions in his notes on the case of *Duppa* v. *Mayo* :—"The principle of these decisions appears to be this, that whenever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation, and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the things sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or *fructus industriales*, &c., the corn and other growth of the earth which are produced, not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity, or whether they have still to derive nutriment from the land to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods:" 1 Wms. Saund. 395.

See also *Warwick* v. *Bruce*, 2 M. & S. 205; *Evans* v. *Roberts*, 5 B. & C. 829; *Sainsbury* v. *Matthews*, 4 M. & W. 343, *ante*, pp. 285, 286, 289. With regard to trees, however, and other products which cannot be regarded as *fructus industriales*, it would appear that the old doctrine still applies, and that a stipulation for immediate removal is necessary to take them out of the 4th section of the Act. See *Smith* v. *Surman*, 9 B. & Cr. 561; *Marshall* v. *Green*, 1 C. P. D. 35.

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In the absence of such stipulation sales of growing grass, timber, or underwood, to be cut by the purchaser, have been held to be within the 4th section, *Crosby* v. *Wadsworth*, *Carrington* v. *Roots*, *Teall* v. *Auty*, *Scorell* v. *Boxall*, above; and, with the exception of the above-mentioned case in Lord Raymond, there is no decision to the contrary. A sale of fixtures which are removable by the tenant, may be stated to come neither within the 4th nor the 17th sections of the Act: *Hallen* v. *Runder*, 1 C. M. & R. 267; *Lee* v. *Gaskell*, 1 Q. B. D. 700. The rule that seems to be most consistent with the cases as to crops, is, that no fixtures, which the executor of the freeholder might claim against the heir, are within the 4th section. In all cases of sales of crops, &c., where the 4th section does not apply, the 17th does; and if the value is 10*l.* or upwards, there must be a writing, or part payment or performance: *Marshall* v. *Green*, 1 C. P. D. 35.

Fixtures.

Parol contract for lease for not more than three years.

A contract for the letting of certain specified rooms as furnished lodgings is, of course, within the 4th section; and it may be here observed generally, that, although a parol lease for a term of not more than three years *executed by entry*, is good as a lease under the 2nd section, yet, until so executed, it is a mere contract within the 4th section, for the non-performance of which no damages can be recovered: *Inman* v. *Stamp*, 1 Stark. 12; *Edge* v. *Stafford*, 1 Cr. & J. 391. But an agreement to let furnished lodgings in a boarding house, giving no exclusive right to occupy any particular room, is not within the statute: *Wright* v. *Stavert*, 6 Jur., N. S. 867; 29 L. J., Q. B. 161.

An agreement by a landlord to furnish a house so as to fit it for the tenant's occupation is within the 4th section, as being part of the contract for the lease: *Mechelen* v. *Wallace*, 7 A. & E. 49.

Contracts between landlord and tenant.

A contract by a tenant to pay an increased rent during the remainder of his term, in consideration of improvements to be made by the landlord, is not a contract for an interest in or concerning land, either in respect of the rent, for that is not properly rent, not being recoverable by distress, or in respect

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of the improvements, for the lessee's interest is the same as before; "it is only that there are bricks and other materials removed from the house, and some others substituted in their room:" Per *Littledale*, J., *Donellan* v. *Read*, 3 B. & Ad. 904. See *Hoby* v. *Roebuck*, 2 Marsh. 433; *Lambert* v. *Norris*, 2 M. & W. 333. An agreement for an *abatement* of rent, however, is clearly within the statute: *O'Connor* v. *Spaight*, 1 Sch. & Lef. 305; and see remarks on *Donellan* v. *Read*, *infra*, p. 310. See *Buttemere* v. *Hayes*, 5 M. & W. 456. So if a tenant agrees to make alterations in a house at his own expense, that is an agreement relating to an interest in land which will not be enforceable if made by parol: *Vaughan* v. *Hancock*, 3 C. B. 766; *Simmons* v. *Simmons*, 12 Jur. 8.

Shares in a company possessing land.

Shares in a railway company are not an interest in land within the 4th section, where the act of incorporation declares that they shall be deemed personal estate; nor would they be so, it seems, even in the absence of such a clause: *Bradley* v. *Holdsworth*, 3 M. & W. 422; *Hibblewhite* v. *M'Morine*, 6 M. & W. 200, 214. But shares in a mining company (which are transferable without the consent of the other partners, 1 Russ. & M. 49) have been held to be within the statute, *Boyce* v. *Green*, Batty, 608; also *Westminster Improvement Bonds*, *Toppin* v. *Lomos*, 16 C. B. 145; and a partnership in land: *Caddick* v. *Skidmore*, 2 De G. & J. 52.

Shares in mines.

Companies for purchasing land.

Shares in companies, subject to the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), and the Companies Act, 1862 (25 & 26 Vict. c. 89), are personal estate, and not of the nature of real estate.

"The test," with regard to shares, "is not whether the holder can in some sense be said to be interested in land, but whether the share is such a share as, under any ordinary state of circumstances, can result to him in the shape of land. In other words, is the right of the shareholder merely a right to call for his share of the profits, and not for a specific part of the land itself:" per *Page Wood*, V. C., in *Entwistle* v. *Davis*, L. R., 4 Eq. 275. See

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also *Morris* v. *Glyn*, 27 Beav. 218; *Freeman* v. *Gainsford*, 34 L. J., C. P. 95; *Robinson* v. *Ainge*, L. R., 4 C. P. 429.

No "interest in land" has been held to be conferred upon holders of shares in any of the following classes of undertakings:—

(i.) Mines on the cost book principle: *Watson* v. *Speatley*, 10 Exch. 222; *S. C.*, 24 L. J., Ex. 53; *Powell* v. *Jessop*, 18 C. B. 336; 25 L. J., C. P. 199; *Walker* v. *Bartlett*, *ibid.* 845; *Hayter* v. *Tasker*, 4 K. & J. 243. (ii.) Mines abroad: *Baker* v. *Sutton*, 1 Keene, 224. (iii.) Gasworks: *Sparling* v. *Parker*, 9 Beav. 450. (iv.) Waterworks: *Bligh* v. *Brent*, 2 Y. & C. Ex. 268; *Ashton* v. *Lord Langdale*, 4 De G. & Sm. 402. (v.) Docks (*x*): *Sparling* v. *Parker*, *ubi supra*; *Hilton* v. *Giraud*, 1 De G. & Sm. 183. (vi.) Canals: *Walker* v. *Milne*, 11 Beav. 507; *Ashton* v. *Lord Langdale*, *ubi supra*; *Edwards* v. *Hall*, 6 De G., M. & G. 74. (vii.) Banks: *Myers* v. *Perigal*, 2 De G., M. & G. 599; *Ashton* v. *Lord Langdale*; *Edwards* v. *Hall*, *ubi supra*. (viii.) Insurance: *March* v. *Att.-Gen.*, 5 Beav. 433. See Agnew, Statute of Frauds, 148.

As to conversion of real estate used for partnership purposes, see *Bligh* v. *Brent*, 2 You. & C., Ex. 268; *Cookson* v. *Cookson*, 8 Sim. 529; *infra*, tit. PARTNERSHIP; and Lindley on Partnership, 4th ed., p. 667, and the cases there cited.

A right to take water from a well is an interest in land: *Tyler* v. *Bennett*, 6 Nev. & M. 826.

Mixed parol contract, where part only is void under the statute.

If part of an entire parol contract relates to land, or is otherwise void under the statute, and another part relates to a matter which is not within the statute, the whole fails: *Mechelen* v. *Wallace*, 2 Nev. & P. 224; *Lord Lexington* v. *Clarke*, 2 Vent. 223; *Chater* v. *Beckett*, 7 T. R. 201; *Thomas* v. *Williams*, 10 B. & Cr. 664; *Earl of Falmouth* v. *Thomas*, 1 Cr., M. & R. 89. See *Corder* v. *Drakeford*, 3 Taunt. 382; *Harvey* v. *Grabham*, 5 Ad. & El. 61; *Hodgson*

(*x*) An agreement for allowing the use of a dock for repairs to ships is not within the statute, and accordingly need not be in writing: *Wells* v. *Mayor, &c. of Kingston-upon-Hull*, L. R., 10 C. P. 402.

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v. *Johnson*, 28 L. J., Q. B. 88. But where the two parts of the contract are not shown to be dependent on each other, that part which does not come within the statute will of course stand: *Read* v. *Nash*, 1 Wils. 305; *Mayfield* v. *Wadsley*, 3 B. & C. 357; *S. C.*, 5 D. & Ry. 224 (*ante*, p. 285). See *Hoby* v. *Roebuck*, 7 Taunt. 157; *Donellan* v. *Read*, 3 B. & Ad. 899 (*infra*, p. 305); *Russell* v. *Moseley*, 6 J. B. Moore, 521; *Mavor* v. *Pyne*, 11 Id. 2; *Thomas* v. *Williams*, 5 Man. & Ry. 625; *Watts* v. *Friend*, Id. 439; *Wood* v. *Benson*, 2 Cr. & J. 94, and the observations on the last cited case in *Williams* v. *Burgess*, 2 Per. & D. 422.

Vendor's lien.

The innovations upon the statute which Courts of Equity have sanctioned in the instances of a vendor's lien for his purchase-money, and the lien created by a deposit of title deeds, are treated of *infra*, tit. MORTGAGES. It may be here noticed, that the lien of a vendor has been considered to be assignable by parol: *Dryden* v. *Frost*, 3 My. & Cr. 670. And, upon principle, it should seem that the benefit of any mortgage security upon real estate may be transferred in equity without writing; for the debt, no doubt, may be so transferred, and the mortgage, which is but an accessory to the debt, must follow its principal. See *Richards* v. *Syms*, Barnard, C. C. 90; *Martin* v. *Mowlin*, 2 Burr. at p. 979. Thus, it has been decided, that a mortgage of real estate may be the subject of a *donatio mortis causâ*, *Duffield* v. *Elwes*, 1 Bligh, N. S. 497; and though much was said in that case about the delivery of the deeds, there seems to be no objection, on the ground of the Statute of Frauds, to an oral assignment for good consideration, without any transfer of the deeds. In the case of *Benbow* v. *Townsend*, 1 My. & K. 506, Sir *J. Leach*, M. R., went farther. There, A. advanced a sum of money upon mortgage of copyholds, and directed the surrender to be made to the use of his brother, B., telling the mortgagor that the principal was to be for the benefit of B., but that he, A., should receive the interest; and Sir *J. Leach* held, that the principal, being personalty, was not within the 7th

Assignment of vendor's lien.

Assignment of mortgage.

section, but belonged to B., by force of A.'s oral declaration.

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Cases not within the Mischief of the Act.]—"In all the cases on the Statute of Frauds in this Court, the end and purport of making it has been considered, viz., to prevent frauds and perjuries; so that any agreement in which there was no danger of either, the court has considered as out of the statute." Per Lord *Hardwicke*, C., *Att.-Gen.* v. *Day*, 1 Ves. sen. 221. Consequently the Act does not extend to sales under the order of the Court, see *Whitbread* v. *Brockhurst*, 1 Br. C. C. 416; *Lord* v. *Lord*, 1 Sim. 503; but a purchaser in such cases is required to sign: Dart, V. & P. 197, n.

Aim of the Act to be regarded.

It was at one time thought, that ordinary sales by auction might, by reason of their publicity, be taken out of the statute, at least as to goods, *Simon* v. *Metivos* or *Metivier*, 1 W. Bl. 599; *S. C.*, 3 Burr. 1921; but it has since been decided otherwise, both as to land and goods: *Walker* v. *Constable*, 1 Bos. & P. 306; *Stansfield* v. *Johnson*, 1 Esp. 101; *Buckmaster* v. *Harrop*, 7 Ves. 341; 13 Id. 456; *Blagden* v. *Bradbear*, 12 Ves. 466; *Higginson* v. *Clowes*, 15 Ves. 516; *Kenworthy* v. *Schofield*, 2 B. & Cr. 945. In most cases the transaction is sustained by the signature of the auctioneer or broker as the agent of the buyer; as to which *vide infra*, p. 323.

Sales by auction.

After some diversity of opinion it is now settled, that, although the defendant admits the agreement, he shall not be obliged to perform it, if, at the same time, he insists on the statute as a defence: *Rondeau* v. *Wyatt*, 2 H. Bl. 63; *Walters* v. *Morgan*, 2 Cox, 369; *Moore* v. *Edwards*, 4 Ves. 23; *Cooth* v. *Jackson*, 6 Id. 12; *Row* v. *Teed*, 15 Ves. 375; *Blagden* v. *Bradbear*, 12 Ves. 466. And see *Cottington* v. *Fletcher*, 2 Atk. 155, a decision on the 7th section, *contra*. But, having once admitted the agreement, and submitted to perform it, he cannot claim the protection of the statute: *Spurrier* v. *Fitzgerald*, 6 Ves. 548. Nor can a plea of the statute be coupled with another defence: *Cooth* v. *Jackson*, 6 Ves. 12. Where the admission is such as the

Effect of admitting parol agreement and pleading the statute.

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plaintiff may take advantage of, he must take it as stated by the defendant, and cannot vary it, or introduce other terms by parol evidence: *Pym* v. *Blackburn*, 3 Ves. 34. See *Wills* v. *Stradling*, 3 Ves. 378. And if the plaintiff has mistaken the agreement, and the defendant admits a different agreement from that stated in the bill, the plaintiff may amend, and obtain a decree for performance of the agreement admitted by the defendant: *Mortimer* v. *Orchard*, 2 Ves. jun. 243. See *Legal* v. *Miller*, 2 Ves. sen. 299.

Fraud.

The statute will not be allowed to be set up in defence of fraud; and if fraud is used to prevent the agreement being put into writing, that will take it out of the statute. See 2 Br. C. C. 565; 2 Ch. Ca. 135; *Oldham* v. *Litchford*, 2 Freem. C. C. 284; *Dutton* v. *Poole*, 1 Vent. 318; *S. C.*, 1 Dick. 14; *Podmore* v. *Gunning*, 7 Sim. 644. And it is considered fraudulent if either party attempt to take advantage of the statute after the agreement has been partly executed (*y*).

Part performance.

The act to be considered as part performance must be in its nature almost necessarily done in pursuance of the alleged contract: *Gunter* v. *Halsey*, Amb. 586; *Frame* v. *Dawson*, 14 Ves. 387; *Ex parte Hooper*, 19 Ves. 479; 2 Rose, 328; 1 Mer. 7. See 1 Swanst. 181. Therefore such preliminary acts, as the delivery of an abstract, giving directions for conveyances, going to take a view, or valuation of the estate, &c., being consistent with a mere *treaty*, are not sufficient: *Clerk* v. *Wright*, 1 Atk. 12; *Whitchurch* v. *Bevis*, 2 Br. C. C. 559; *Redding* v. *Wilkes*, 3 Br. P. C. 400; *Earl of Glengall* v. *Barnard*, 1 Kee. 769; *Phillips* v. *Edwards*, 33 Bea. 440. See also *Hawkins* v. *Holmes*, 1 P. Wms. 770, where the execution and registration of the conveyance by the plaintiff was held insufficient. The procuring of a release from a stranger in consideration of a free admission to the Pantheon, of the value of 15*l.* per annum, was held not to be part performance,

(*y*) Part performance as to one lot will not affect contracts between the same parties as to other lots sold at the same auction: *Buckmaster* v. *Harrop*, 7 Ves. 341; 13 Id. 456.

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but preparatory merely, and not sufficient to exclude the statute: *O'Reilly* v. *Thompson*, 2 Cox, 271. But taking possession with the vendor's consent is a part performance: *Lord Aylesford's case*, 2 Str. 783; *Potter* v. *Potter*, 1 Ves. sen. 437; *Bowers* v. *Cator*, 4 Ves. 91; *Buckmaster* v. *Harrop*, 13 Ves. 456; *Morphett* v. *Jones*, 1 Swanst. 172. See *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123; *Savage* v. *Carrol*, 1 Ball & B. 551; *Kine* v. *Balfe*, 2 Id. 348; *Mundy* v. *Jolliffe*, 9 Sim. 413. Express consent is not necessary if the vendor has acquiesced: *Gregory* v. *Mighell*, 18 Ves. 328; *Pain* v. *Coombs*, 1 De G. & J. 34; *S. C.*, 3 Sm. & Gif. 449. And if the vendor allows the purchaser to make improvements, or expend money upon the property, that makes the case stronger: *Wills* v. *Stradling*, 3 Ves. 378; *Mortimer* v. *Orchard*, 2 Ves. jun. 243; *Shillibeer* v. *Jarvis*, 8 De G., M. & G. 79. See *Marshall* v. *Corporation of Queenborough*, 1 Sim. & St. 520; *Wilmot* v. *Corporation of Coventry*, 1 Y. & C. Ex. 518 (as to contracts not under the seal of a corporation (*z*)); and see *O'Reilly* v. *Thompson*, 2 Cox, 271; *Charlwood* v. *Duke of Bedford*, 1 Atk. 497. But the terms of the agreement must of course be clearly made out; and where there is any discrepancy in the evidence, the Court will not decree performance: *Reynolds* v. *Waring*, You. 436. But if the Court can satisfy itself of the facts, a controversy between the parties as to the sums, and a variance in the evidence, will not prevent performance being decreed. Per Lord *Hardwicke*, *Att.-Gen.* v. *Day*, 1 Ves. sen. at p. 221; *Allan* v. *Bower*, 3 Br. C. C. 149. See 3 Ves. 712; 6 Ves. 470; 1 Sch. & Lef. 40; 1 Swanst. 172; 1 Wils. 100. Where the party is a tenant, who, of course, continues in possession, unless he has notice

(*z*) In these cases a corporation was held bound by contracts not under seal, on the faith of which expenditure had been made. With some exceptions (see *post*, p. 309), a corporation can only be bound at law by its common seal: *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815. But a corporation may be bound by acquiescence in part performance of an unsealed agreement. See *Crook* v. *Corporation of Seaford*, L. R., 6 Ch. 551; see also *Nicholson* v. *Bradfield Union*, L. R., 1 Q. B. 620; *Austin* v. *Bethnal Green*, L. R., 9 C. P. 91; *Mayor of Kidderminster* v. *Hardwick*, L. R., 9 Ex. 13.

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to quit, the mere fact of his continuance in possession (which is all that can be admitted, for *quo animo* he continued in possession, is not a subject of admission) would not weigh: 3 Ves. 381; *Savage* v. *Carroll*, 1 Ball. & B. at p. 282; 1 Swanst. 181. But payment of an additional rent, though equivocal, may be evidence of part performance. If it is averred that the defendant accepted the additional rent upon the foot of the agreement, he must say whether it was accepted upon a yearly holding, or any other ground: 3 Ves. 382. In *Frame* v. *Dawson*, 14 Ves. 386, a tenant under a lease, who was bound to repair, rebuilt a party-wall, which was ruinous, and insisted on that as part performance of an agreement by the landlord, that in consideration of his doing so, he should have ten years added to his lease. But it was objected, that he was bound to rebuild the wall under the Building Act; and the statute was held to apply. Sir *W. Grant*, M. R.: "It is necessary to show a part performance; that is, an act unequivocally referring to and resulting from the agreement, and such, that the party would suffer an injury, amounting to fraud, by the refusal to execute that agreement. . . . . This is not an unequivocal act, for it would have taken place equally if there had been no agreement. The principle of the case is, that the act must be of such a nature that, if stated, it would, of itself, infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is. But this act would not infer the existence of any agreement; as it must have been done by the party, either at his own or the landlord's expense. Then, is there such injury as cannot easily be repaired in any other way than by executing the agreement? No; for the money which he has expended he may recover from the landlord, if it was by the landlord that the expense was to be borne. The circumstance that the party may be obliged to resort to an action to get back his money, is no reason for taking the case out of the statute." See *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1; *Ramsden* v. *Dyson*, L. R., 1 H. L. 129; *Bankart* v. *Tennant*, L. R., 10 Eq. 141.

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Whether the payment of the whole or a substantial part of the purchase-money is such a part performance of a contract for the sale of lands as will take the case out of the statute, has been the subject of many contradictory decisions and dicta. In *Lacon* v. *Mertins*, 3 Atk. 1; *S. C.*, sub nom. *Lacon* v. *Mertins*, 1 Ves. sen. 312; and *Maine* v. *Melbourn*, 4 Ves. 720, it was said that a payment of a considerable part of the price would have that effect. In *Ex parte Hooper*, 1 Mer. 9, Lord *Eldon* treated it as unsettled; and see 7 Ves. 345. In Freem. 486, ca. 664 b, it is laid down that payment of a great part of the money would not take the case out of the statute. *Seagood* v. *Meale*, Pr. Ch. 560, decided that payment of a small portion of the purchase-money would not do; and it was said generally that the payment of money was only binding in cases of contracts for goods. See *Dickinson* v. *Adams*, 4 Ves. 722. Lord *Alvanley*, in *Forster* v. *Hale*, 3 Ves. 712, disapproved of the decisions as to part performance, and said that there might be a compensation in all cases.

Effect of paying part or all of the purchase-money.

Clinan v. *Cooke*.

In *Clinan* v. *Cooke*, 1 Sch. & Lef. 22, Lord *Redesdale* said: "It has always been considered that the payment of money is not to be deemed part performance to take a case out of the statute. *Seagood* v. *Meale*, Pr. Ch. 560, is the leading case on that subject; there a guinea was paid by way of earnest, and it was agreed clearly that it was of no consequence in case of an agreement touching lands. Now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both cases as part payment, and no distinction can be drawn. But the great reason, as I think, why part payment does not take such agreement out of the statute is, that the statute has said that in another case, viz., with respect to goods, it shall operate as part performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred that where the legislature has said it should bind in the case of goods, &c., and were silent as to the case of lands, they meant that it should not bind in the case of lands. But I take another reason also to

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prevail on the subject. I take it that nothing is considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed. For instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. . . . Payment of money is not part performance, for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest." See *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123; *Watt* v. *Evans*, 4 Y. & C. 579; and the remarks of Sir *W. Grant*, *ante*, p. 298.

Payment of purchase-money.

In *Hughes* v. *Morris*, 2 De G., M. & G. at p. 356, *Knight-Bruce*, L. J., said: "A parol contract for the sale of land, though all the money be paid without part performance (for payment of the money is no part performance), cannot be carried into effect, if the person sued chooses to avail himself of the defect."

Where a landlord agreed to grant to an occupying tenant a lease for twenty-one years, and died before execution of the lease, having accepted from the tenant one quarter's rent at the increased rent, it was held that there was sufficient part performance to entitle the tenant to enforce the contract: *Nunn* v. *Fabian*, L. R., 1 Ch. 35. But in the case of *Alderson* v. *Maddison* (C. A.), 7 Q. B. D. at p. 178, *Baggallay*, L. J., stated the general principle of law as follows: "It is a well recognized rule that if in any particular case the acts of part performance of a parol agreement are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement; in other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the alleged subject-matter of the agreement; it is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject-matter. As was said by Lord *Hardwicke*, in the case of *Gunter* v. *Halsey*, 2 Amb. 586, they must be such as could

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have been done with no other view or design than to perform the agreement." In that case, A. induced the defendant to serve him, without wages, as housekeeper by a verbal promise to make a will devising to her a life interest in a farm. A. having died intestate, it was held that, although the woman had fully performed her part by serving till the death of A. without wages, her service was not unequivocally referable to any contract, and therefore did not amount to part performance, so as to take the case out of the Statute of Frauds. This decision has very recently been affirmed on appeal by the House of Lords: *Maddison* v. *Alderson*, 8 App. Cas. 467. See also *Humphreys* v. *Green*, 10 Q. B. D. 148, where the decision in *Nunn* v. *Fabian*, *supra*, was expressly disapproved of.

So also a parol agreement for a lease will be enforceable if the tenant has actually entered into occupation thereunder so as to affect his mode of living: *Coles* v. *Pilkington*, L. R., 19 Eq. 174. See also *Williams* v. *Evans*, L. R., 19 Eq. 547.

And where a father, in consideration of his daughter's marriage, verbally promised her and her husband to give them a house for their occupation, and he put them in possession accordingly, and died leaving a charge thereon unpaid, it was held, that the possession took the case out of the Statute of Frauds, and that the charge must be paid out of the father's estate: *Ungley* v. *Ungley*, 5 Ch. D. 887.

Parol contract respecting land executed at law.

A parol agreement respecting land being completely executed on both sides in respect of the land, will be taken out of the statute, although not fully performed in other respects. Thus, where a tenant being restrained from assigning without license, verbally agreed with his landlady that if she would accept another tenant in his place, he would pay her 40*l.* out of 100*l.*, which he was to receive for the good-will if her consent were obtained, and the new tenant was let into possession, and paid the 100*l.* to his predecessor, being cognizant of the agreement, it was held, that as the agreement was executed, the landlady could recover the 40*l.* as money received to her use: *Griffith* v. *Young*, 12

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East, 513. See also *Green* v. *Suddington*, 7 E. & B. 503.

Agreement by mortgagor to pay costs.

An agreement by an intending mortgagor to pay costs of investigation of the title, &c., if the negotiations for a loan should prove abortive, is merely collateral to the proposed mortgage of the land, and appears not to be within the statute: *Jeakes* v. *White*, 6 Exch. 873.

What undertakings for third persons are within the 4th section.

Promise to answer for the Debt, &c. of Another.]—The "special promise to answer for the debt, default, or miscarriage of another person," contemplated by the Act, is often called a *collateral* promise (see Bull. N. P. 281), and is distinguished from contracts which constitute a *primary* liability, though for the benefit of another person. Thus, in *Birkmyr* v. *Darnell*, Salt. 27; *S. C.*, 1 Sm. L. C. 326, Lord *Holt* said: "If two come to a shop, and one buys, and the other to gain him credit promises the seller —*If he does not pay you, I will;* this is a collateral undertaking, and void, without writing, by the Statute of Frauds. But if he says—*Let him have the goods, I will be your paymaster*, or *I will see you paid;* this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." See 1 Wms. Saund. 211, n.; *Peckham* v. *Faria*, 3 Doug. 13; *Tomlinson* v. *Gell*, 1 Nev. & P. 588; *S. C.*, 6 A. & E. 453; *Goodman* v. *Chase*, 1 B. & Al. 297; *Mountstephen* v. *Lakeman*, L. R., 7 H. L. 17. The question, to whom was the primary credit given, is for the jury: Bull. N. P. 281; *Darnell* v. *Trott*, 2 Car. & P. 82. It is immaterial, for this purpose, whether the promise was given before or after the third person obtained the goods on credit: *Matson* v. *Wharam*, 2 T. R. 80; *Jones* v. *Cooper*, Cowp. 227; *Green* v. *Cresswell*, 2 Per. & D. 430; *S. C.*, 10 A. & E. 455. Where A. sold goods to B., and B., not being able to pay for them, transferred them to C., who promised A. that he would pay for them, this was held to be a new sale to C., and not within the clause: *Browning* v. *Stallard*, 5 Taunt. 450. For other instances of promises not within the statute, see *Howes* v. *Martin*, 1 Esp.

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162; *Houlditch* v. *Milne*, 3 Id. 86; *Barrell* v. *Trussell*, 4 Taunt. 117; *Castling* v. *Aubert*, 2 East, 325; *Anstey* v. *Marden*, 1 N. R. 124; *Goodman* v. *Chase*, 1 B. & Al. 297; *Dixon* v. *Hatfield*, 10 J. B. Moore, 42; *Bampton* v. *Paulin*, 12 Id. 497; *Lacy* v. *M'Neile*, 4 Dowl. & R. 7; *Hodgson* v. *Anderson*, 5 Id. 735; *Adams* v. *Dansey*, 4 Moo. & P. 245; *Bushell* v. *Beavan*, 4 Moo. & Sc. 622; *Andrews* v. *Smith*, 2 Cr., M. & R. 627; *Simpson* v. *Penton*, 2 Cr. & M. 430; *Bird* v. *Gammon*, 5 Scott, 213. As to the consideration for the promise, *vide infra*, p. 326.

Collateral contract for indemnity.

An agreement, upon coming into a partnership, to indemnify the outgoing partner from the debts, has been held not to be within the Statute of Frauds; the transaction is rather a purchase than a guarantee: *Warren* v. *Taylor*, 1 C. P. Coop. 174; See 1 N. R. 124; *Thomas* v. *Cook*, 8 B. & Cr. 728.

Agreement not to be performed within the year.

Agreement not to be performed within the Year.]—This clause does not control the other part of the section, so as to give validity to any agreements relating to land, &c., which must be in writing, although they are to be performed within the year. See *Hollis* v. *Edwards*, 1 Vern. 159. It was there said, that the clause did not extend to agreements respecting land at all; but that is not so, *vide ante*, p. 277. An agreement for a hiring for a year, not to commence immediately, is within the 4th section: *Bracegirdle* v. *Heald*, 1 B. & Al. 722 (where the agreement had not been performed at all, and the breach occurred within the year); *Snelling* v. *Lord Huntingfield*, 1 Cr., M. & R. 20; *Banks* v. *Crossland*, L. R., 10 Q. B. 97; *Britain* v. *Rossiter*, 11 Q. B. D. 123. A hiring for a year from the present time, and thenceforth from year to year so long as the parties shall please, is not within the statute: *Beeston* v. *Collyer*, 12 J. B. Moore, 552; *Sykes* v. *Dixon*, 9 A. & E. 693. See also *Giraud* v. *Richmond*, 2 C. B. 835. An agreement to hire a carriage for as term of years, determinable at any time on payment of a year's hire, is within the statute: *Birch* v. *Earl of Liverpool*, 9 B. & C. 392; *Dobson* v. *Collis*, 25 L. J., Ex. 267.

Uncertainty as to the time within which

Where the agreement is to be performed upon a contingent or future event, and it does not appear

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upon the face of it that this is to happen after the end of the year, a note in writing is not necessary, although, in fact, the agreement is not performed within the year: *Souch* v. *Strawbridge*, 2 C. B. 808; *Wells* v. *Horton*, 12 J. B. Moore, 182; 4 Bing. at p. 43; *Smith* v. *Neile*, 2 C. B., N. S. 67; 26 L. J., C. P. 143. Where the father of illegitimate children verbally promised their mother that so long as she should maintain and educate the children, he would pay her an allowance of 300*l.* a year, it was held that the mother was entitled to recover arrears of the annuity accrued during two and a-half years: *Knowlman* v. *Bluett*, L. R., 9 Ex. 307. But where it appears from the whole tenor of the agreement, that it is to be performed, in whole or in part, after the year, the 4th section applies. In *Peter* v. *Compton*, Skin. 353, the defendant promised for a guinea to give the plaintiff so many at the day of his marriage; and the agreement was held good without writing, although the marriage did not take place until nine years afterwards. So in *Fenton* v. *Emblers*, 1 W. Bl. 353; 3 Burr. 1278, where the agreement was, that, in consideration that the plaintiff would become the defendant's testator's housekeeper, the testator would bequeath to her a certain annuity for life, *Denison*, J., said: "The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon a contingency." See *Wells* v. *Horton*, 12 J. B. Moore, 176. In this particular, the 17th section has received a different construction from the 4th: for it has been held, that an agreement for the sale of goods at a certain rate, the quantity being uncertain at the time, but which eventually proved to be so much as to make the price for the whole amount to more than 10*l.*, was within the 17th section: *Watts* v. *Friend*, 10 B. & Cr. 446.

agreement is to be performed.

Agreement not to be performed within the year.

Boydell v. *Drummond*.

Part performance.

Where the defendant agreed to take the Boydell prints from Shakspeare, upon an understanding that there were to be eighteen numbers at three guineas each, to be published at the rate of one or

two numbers in a year; and on the delivery of each number, two guineas were to be paid in advance for the next number: and the defendant paid his two guineas: it was held that the clause in question applied, for the parties could not have contemplated the completion of the contract within the year: *Boydell* v. *Drummond*, 11 East, 142; *Bracegirdle* v. *Heald*, 1 B. & Al. 726; *Roberts* v. *Tucker*, 3 Exch. 632. But payment for past numbers is enforceable, as a fresh contract to pay for each copy as it was delivered will be implied: *Mavor* v. *Pyne*, 3 Bing. 285. The statute does not apply where the agreement is wholly executed or intended to be executed by one of the parties within the year, although acts may remain to be done beyond that period by the other party. In the case of *Donellan* v. *Read*, 3 B. & Ad. 899, the defendant, being tenant for years of a messuage, under a lease, agreed, by parol, with his landlord to pay an increased rent of 5*l.* during the remainder of the term, the landlord laying out 50*l.* in certain improvements; and the landlord having performed his part within the year, it was held not to be a contract for an interest in or concerning land, and that he might sue the tenant for the increased rent.

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Donellan v. *Read.*

In the case of *Davey* v. *Shannon*, 4 Ex. D. 81, a contract providing that the defendant should enter the plaintiff's employment for three years, and that if he should leave the plaintiff, he would not carry on a similar business within a specified distance of the plaintiff's establishment, was held to be an agreement *primâ facie* not to be performed within the year (*a*), and therefore within sect. 4 of the Statute of Frauds.

Davey v. *Shannon.*

Contract for the sale of Goods.]—It was formerly held, that if the goods did not exist at the time of

Sale of goods; what cases within the 17th section.

(*a*) It is to be observed, that in all cases of part performance, by work done, or delivery of goods, the value of the work or goods may be recovered on a *quantum meruit*: *Teall* v. *Auty*, 2 Br. & B. 101; *S. C.*, 4 J. B. Moore, 542 (*vide ante*, p. 285); and *Mavor* v. *Pyne*, 3 Bing. 285.

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the contract in the state in which they were to be delivered, the case was not within the 17th section: *Towers* v. *Osborne*, 1 Strange, 506; *Clayton* v. *Andrews*, 4 Burr. 2101. The 7th section of the stat. 9 Geo. 4, c. 14 (*ante*, p. 276), has set the question at rest, and extends the provisions of the 17th section of the Statute of Frauds to executory contracts of the kind mentioned above. See *Hoadley* v. *Maclaine*, 10 Bing. 482; *S. C.*, 4 Moo. & Sc. 340; *Lee* v. *Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252. And the agreement is within the clause, although at the time it is made, it is uncertain whether the goods will be of the value of 10*l.*, provided they do in the event prove to be of that value: *Watts* v. *Friend*, 10 B. & Cr. 446; 9 Geo. 4, c. 14, s. 7. See *Bacon* v. *Simpson*, 3 M. & W. at p. 85. So also an agreement to pay exceeding 10*l.*, partly in consideration of a sale of goods of less value than 10*l.*, and partly for other considerations: *Harman* v. *Reeves*, 18 C. B. 586.

What are "goods, &c." within the 17th section.

A *chose en action* does not seem to come within the description of goods and chattels in this clause. Thus it has been held that shares in a canal company are not within it, *Latham* v. *Barber*, 6 T. R. 67; nor railway shares, see *Bradley* v. *Holdsworth*, 3 M. & W. 422; *Hibblewhite* v. *M'Morine*, 6 M. & W. at p. 214; and *Bligh* v. *Brent*, 2 You. & C. Ex. 268; nor do they come within the clause relating to the sale of interests in land (*vide ante*, p. 293); nor are shares in a joint-stock banking company, *Humble* v. *Mitchell*, 3 Per. & D. 141; 2 Rail. Cas. 70; nor, it seems, is stock in the British or foreign funds, see *Pickering* v. *Appleby*, Com. 354; *Mussell* v. *Cooke*, Pr. Ch. 533; *Crull* v. *Dodson*, Sel. Cas. Ch. 41; *Colt* v. *Nettervill*, 2 P. Wms. 304; *Pawle* v. *Gunn*, 6 Scott, 286; but foreign bonds and other securities transferable by delivery are perhaps saleable goods within the Act, see *Att.-Gen.* v. *Bouwens*, 4 M. & W. 171; see also *Att.-Gen.* v. *Dimond*, 1 Cl. & J. 356; *Pearse* v. *Pearse*, 9 Sim. 430. As to tenant's fixtures, see *Hallen* v. *Runder*, 1 Cr., M. & R. 266; *Lee* v. *Gaskell*, 1 Q. B. D. 700. An agreement to procure coals at A., and carry them to B.,

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at a stipulated price, is not within this clause: *Cobbold* v. *Caston*, 8 J. B. Moore, 456; *S. C.*, 1 Bing. 399. See *Astey* v. *Emery*, 4 Mau. & Sel. 262. A sale of growing crops is a sale of goods within the meaning of this section: *Marshall* v. *Green*, 1 C. P. D. 35; *vide ante*, p. 291.

What is a delivery.

In order to satisfy the requisitions of the 17th section, it is not necessary that the goods should be actually delivered into the hands of the buyer; an unequivocal constructive delivery or acceptance is sufficient. Thus, delivery of the key of the warehouse in which the goods lie, or delivery of the goods to an agent or carrier appointed by the buyer, is a sufficient delivery; and any act of ownership exercised over them by the buyer, with the assent of the vendor, is a sufficient acceptance. See *Chaplin* v. *Rogers*, 1 East, 195; *Ryall* v. *Rolls*, 1 Atk. 171; 2 W. & T. 729, 5th ed.; *Elmore* v. *Stone*, 1 Taunt. 458; *Blenkinsop* v. *Clayton*, 7 Id. 597; 1 J. B. Moore, 328; *Astey* v. *Emery*, 4 Mau. & S. 262; *Howe* v. *Palmer*, 3 B. & Al. 321; *Tempest* v. *Fitzgerald*, Id. 680; *Carter* v. *Toussaint*, Id. 855; *Hanson* v. *Armitage*, 5 B. & Al. 557; *Maberley* v. *Shepherd*, 10 Bing. 99; *S. C.*, 3 M. & Sc. 436; *Phillips* v. *Bistolli*, 2 B. & Cr. 511; *Hart* v. *Sattley*, 3 Camp. 528; *Bains* v. *Jevans*, 7 Car. & P. 288; *Castle* v. *Sworder*, 6 H. & N. 828; 30 L. J., Exch. 310. As to the effect of marking the article, see *Hodgson* v. *Le Bret*, 1 Camp. 233; *Stoveld* v. *Hughes*, 14 East, 308; *Baldey* v. *Parker*, 2 B. & Cr. 37; 3 D. & Ry. 220; and as to giving a delivery order, see *Searle* v. *Keeves*, 2 Esp. N. P. 598; *Bentall* v. *Burn*, 3 B. & Cr. 423. As to delivery to a common carrier, see *Dawes* v. *Peck*, 8 T. R. 330; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600; *Hart* v. *Bush*, 4 B. & E. 494; 27 L. J., Q. B. 271; *Cusack* v. *Robinson*, 1 B. & S. 299; *Smith* v. *Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145. As to the right of returning the goods on account of defects, and as to delivery or acceptance expressly subject to approval, see *Coleman* v. *Gibson*, 1 M. & Rob. 168; *Acebal* v. *Levy*, 10 Bing. 376; *S. C.*, 4 M. & Sc. 217; *Kent* v. *Huskisson*,

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3 B. & P. 233; *Jordan* v. *Norton*, 4 M. & W. 155. Acceptance of a sample is not sufficient, unless it can be considered as part of the goods purchased: *Talver* v. *West*, Holt, 178; *Hinde* v. *Whitehouse*, 7 East, 558; *Keinitz* v. *Surrey*, 5 Esp. 267; *Johnson* v. *Dodgson*, 2 M. & W. 656; *Elliott* v. *Thomas*, 3 Id. 170. If goods of several kinds are included in one contract, acceptance of goods of one kind takes the whole out of the statute: *Elliot* v. *Thomas*, 3 Mee. & W. 170. See *Baldey* v. *Parker*, 3 D. & Ry. 220; 2 B. & Cr. 37, where various articles were purchased at a linendraper's shop at separate prices, each under 10*l.*, and it was held to be one contract, and within the statute. So, an agreement to return the goods on a contingency, and payment of a sum of money, is part of the original contract of sale, and the entire contract is taken out of the statute by delivery to the buyer in the first instance: *Williams* v. *Burgess*, 2 Per. & D. 422. See *Watts* v. *Friend*, 10 B. & C. 446. If the vendor is in a situation to enforce his lien against the goods, that is a criterion of non-delivery. See *Baldey* v. *Parker*, 3 D. & Ry. 220; *Holderness* v. *Shackells*, 8 B. & Cr. 618; *Tansley* v. *Turner*, 2 Scott, 238. So, an act which would amount to a delivery, if the contract were complete, is not sufficient, if any term of the agreement remains to be settled: *Proctor* v. *Jones*, 2 Car. & P. 532. See further, on the question as to what amounts to acceptance, so as to take cases out of the statute, Chitty's Statutes, Vol. 2, pp. 1248 *et seq.*

Vacating effect of the 17th section.

It would seem that the 17th section, unlike the 4th, totally *avoids* the contracts which do not conform to its requisitions (*b*).

(*b*) See *Laythoarp* v. *Bryant*, 3 Scott, 256; *Stockdale* v. *Dunlop*, 6 Mee. & W. 224. But see a dictum of Lord *Denman*, *contra*, *Stead* v. *Dawber*, 2 Per. & D. 452. The memorandum under the 4th section is not the contract but only the evidence of it, and therefore may be constituted by a letter to a third person: 3 Atk. 503. See *Bateman* v. *Phillips*, 15 East, 272.

III.—What Signature is sufficient.

Statute of Frauds: Signature to Agreement.

Corporations.]—The regular way of signing by a corporation is by its corporate seal. See *ante*, p. 297, and cases cited in *Wilmot* v. *Corporation of Coventry*, 1 You. & C. Ex. 518; also *Mayor of Kidderminster* v. *Hardwick*, L. R., 9 Q. B. 13; *Austin* v. *Guardians of Bethnal Green*, L. R., 9 C. P. 91; *Crampton* v. *Varna Rail. Co.*, L. R., 7 Ch. 562. But the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), after authorizing directors to appoint committees (see sect. 95), enacts as follows:—

Contracts by committees or directors, how to be entered into (*c*).

Sect. 97. "The power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows; (that is to say,)

"With respect to any contract which, if made between private persons would be by law required to be in writing, and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same with respect to any contract which, if made between private persons, would be by law required to be in writing and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company, in writing, signed by such committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same.

"With respect to any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same.

"And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors or administrators, as the case may be, and on any default in the execution of any such contract, either by the company or other person thereto, such actions or suits may be brought either by or against the company, as might be

(*c*) As to contracts by railway companies for purchase of lands required for purposes of their undertakings, see *post*.

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brought had the same contracts been made between private persons only."

Limited companies.

With respect to companies incorporated under the Companies Act, 1862, very similar provisions are contained in the 37th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), except that contracts in writing and by parol are to be made on behalf of the company "by any person acting under the express or implied authority of the company" (*d*).

Contracts by local authorities.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), sect. 173, empowers local authorities to enter into contracts necessary for carrying the Act into execution; and sect. 174 of that Act lays down regulations with regard to such contracts. These regulations must be strictly observed to entitle persons claiming under such contracts to recover; and this rule has been held to apply to the case of an unsealed contract which had been effected by the agent of a local authority, and of which the full benefit had been enjoyed by the local authority: *Young* v. *Mayor, &c. of Leamington*, 8 App. Ca. 517.

Signature by one party only.

What is sufficient Signature.]—It was doubted by Lord *Redesdale*, whether a contract signed by one party alone could be enforced against him, there being no mutuality between the parties: *Lawrenson* v. *Butler*, 1 Sch. & Lef. 20; and see *Boys* v. *Ayerst*, 6 Mad. 323. But the notion is inconsistent with a stream of authorities, in which the contrary has been held, as to undertakings and guarantees within the 4th section, as well as to contracts for the sale of land and goods: *Seton* v. *Slade*, 7 Ves. 265; *Fowle* v. *Freeman*, 9 Ves. 351; *Rowe* v. *Osborne*, 1 Stark. 140; *Egerton* v. *Matthews*, 6 East, 307; *Boys* v. *Ayerst*, 6 Mad. 323; *Laythoarp* v. *Bryant*, 3 Scott, 249; *Owen* v. *Thomas*, 3 Myl. & K. 353; *Warner* v. *Willington*, 3 Drew. 523; 25 L. J., Ch. 662; *Smith* v. *Neale*, 2 C. B., N. S. 67; 26 L. J., C. P. 143; *Reuss* v. *Picksley*, L. R., 1 Ex. 342; *Beer* v. *London and Paris Hotel*

(*d*) The provisions above referred to being merely enabling, not directory, the powers thereby given may be negatived or modified by the articles of association.

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Co., L. R., 20 Eq. 412. These authorities have established that it is enough that the contract is signed by the party to be charged, such being the terms of the Statute of Frauds. The doctrine of the above cases applies as much to the 17th as to the 4th section, although in the former the word *parties* is used, while the latter has *party*: *Laythoarp* v. *Bryant*, 3 Scott, 249; *Allen* v. *Bennet*, 3 Taunt. 169. As to alterations in a written contract after signature, see *Stewart* v. *Eddowes*, L. R., 9 C. P. 311.

Agreement must contain the names of both parties.

But though a signature by both parties is not necessary, it is essential that the names of both parties should appear upon the memorandum or writing, *Cooper* v. *Smith*, 15 East, 103; *Williams* v. *Byrnes*, 1 Moo. P. C. C., N. S. 154; 9 Jur., N. S. 363; *Williams* v. *Lake*, 29 L. J., Q. B. 1; *Vandenbergh* v. *Spooner*, L. R., 1 Ex. 316; *Sale* v. *Lambert*, L. R., 18 Eq. 1; *Commins* v. *Scott*, L. R., 20 Eq. 11; *Catling* v. *King*, 5 Ch. D. 660; *Williams* v. *Jordan*, 6 Ch. D. 517; or upon some writing which can be connected with it: *Dobell* v. *Hutchinson*, 5 Nev. & M. 151; *Jacob* v. *Kirk*, 2 M. & Rob. 221; *Trueman* v. *Loder*, 3 Per. & D. 267; *Warner* v. *Willington*, 3 Drew. 523; 25 L. J., Ch. 662. But the reference must be clear: *Boydell* v. *Drummond*, 11 East, 142; *Skelton* v. *Cole*, 1 De G. & J. 587; *Newell* v. *Radford*, L. R., 3 C. P. 52 (*e*). The signature of an agent would be sufficient without naming the principal, if a description to identify the principal is given, *e. g.*, "the proprietors," *Sale* v. *Lambert*, L. R., 18 Eq. 1; *Beer* v. *Paris Hotel Co.* L. R., 20 Eq. 412; *Rossiter* v. *Miller* (C. A.), 5 Ch. D. 648, "the Company," *Commins* v. *Scott*, L. R., 20 Eq. 11, "a trustee selling under a trust for sale:" *Catling* v. *King*, 5 Ch. D. 660. But the term "vendor" is not a sufficient description, *Potter* v. *Duffield*, L. R., 18 Eq. 4; but the purchaser may by his conduct be estopped from repudiating the contract on the ground of such insufficient description: *Thomas* v. *Brown*, 1 Q. B. D. 714. It should seem that until

(*e*) As to whether evidence would be received connecting an envelope, bearing the name of the person to whom a letter is addressed, with the letter, see *Sarl* v. *Bourdillon*, 5 W. R. 196.

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some act has been done by the party who has not signed to render the contract binding on him, it is open to the other party to retract; for there can be no contract, properly speaking, without a reciprocity of obligation. See 2 Jac. & Walk. 428; *Palmer* v. *Scott*, 1 Russ. & M. 391; *Latch* v. *Wedlake*, 3 Per. & D. 499. At all events, if he should refuse to sign, upon being required so to do, it is probable that the Court would not allow him afterwards to compel performance. Where one of several persons on one side, who were to be bound by an agreement, refused to sign after his co-parties had signed, it was held to be a fit question for a jury to determine whether the parties who signed did so in the faith that the other would execute, and intended to bind themselves only on condition that he was bound also: *Latch* v. *Wedlake*, 3 Per. & D. 499. See *Elliot* v. *Davis*, 2 Bos. & P. 338; *Fletcher* v. *Dyche*, 2 T. R. 32; *Strangford* v. *Green*, 2 Mod. 227.

Conditional signature.

Signature, how to be made.

It has been decided that if a man draw up an agreement in his own handwriting, beginning—"I, A. B., agree, &c.," and leave a place for signature at the bottom, but never signs it, it may be considered as a note or memorandum in writing, signed within the statute: *Knight* v. *Crockford*, 1 Esp. 190; *Ogilvie* v. *Foljambe*, 3 Mer. 62. See also *Emmerson* v. *Heelis*, 2 Taunt. 38; *Johnson* v. *Dodgson*, 2 M. & W. 659. And it is immaterial that the party writes his name in the third person: *Propert* v. *Parker*, 1 Russ. & M. 625; *Western* v. *Russell*, 3 Ves. & B. 187; *Bleackley* v. *Smith*, 11 Sim. 150. A signature on goods, or opposite lots in a printed catalogue, or in an order book, have been held sufficient to bind a purchaser: *Hodgson* v. *Le Bret*, 1 Camb. 233; *Phillimore* v. *Barry*, Ib. 513; *Newell* v. *Radford*, L. R., 3 C. P. 52. When, however, an agreement concludes with the words, "as witness our hands," or other words indicating that a subscribed signature was intended, such signature alone will be held sufficient: *Hubert* v. *Treherne*, 3 M. & G. 743. See also *Reg.* v. *Tart*, 28 L. J., Q. B. 173. "The signature is to have the effect of giving authenticity to the whole instrument: and if the name is inserted *so as to have*

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that effect, I do not think it signifies much in what part of the instrument it is found. It is perhaps difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect. I do not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, can amount to such an authentication as is required by the statute." Per *Eyre*, B., *Stokes* v. *Moore*, 1 Cox, 223. In that case it was held that the defendant was not chargeable upon a draft of instructions for preparing a lease, written by him, and containing his name, but not signed. The Court said that the memorandum might have been made subject to alterations, and, indeed, by the evidence it appeared that it did not contain the final agreement; and they distinguished the cases of wills, because the attestation there sufficiently showed that the testator considered the will complete. See *Hawkins* v. *Holmes*, 1 P. Wms. 770; *Morison* v. *Turnour*, 18 Ves. 175; *Ogilvie* v. *Foljambe*, 3 Mer. 62; *Caton* v. *Caton*, L. R., 2 H. L. 127. So, delivery of the particulars of the property, signed by the vendor, although the terms of the contract are also written, is not binding: *Cooke* v. *Tombs*, 2 Anst. 420; *Whaley* v. *Bagnell*, 1 Br. P. C. 345. The principle, however, laid down by *Eyre*, B., in *Stokes* v. *Moore*, does not seem to be quite correct. The question is, not whether the party *intended* to bind himself, or to authenticate the writing, by signing his name, but whether the writing, with his name occurring in it, is sufficient evidence that the agreement was made. Thus, the signing of letters by which the party never intended to bind himself, has been held to be a signing within the statute, and that even where the party wrote a letter to his own agent, setting forth the terms of an agreement as concluded by him: *Smith* v. *Watson*, Bunb. 55; *Owen* v. *Thomas*, 3 Myl. & K. 353. See *Welford* v. *Beazley*, 3 Atk. 503; *Clerk* v. *Wright*, 1 Id. 12, n. The case of *Tawney* v. *Crowther*, 3 Br. C. C. 161, 318, affords a striking instance of the application of this principle. There an agreement was reduced to writing, but the defendant did not keep an

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appointment which he had made to sign it; and on being written to by the plaintiff's agent, urging him to sign it, he replied by letter that there would be time enough until Michaelmas (when the *conveyance* was to be executed) to settle everything, and that his word should be as good as any security he could give; and it was held to be a good signing, on the ground that the agreement was admitted, although the signature was not. Lord *Redesdale*, who disapproved of this decision, because he considered that the meaning of the defendant was, "I will not bind myself, but you shall rely on my word" (1 Sch. & Lef. 33), seems to have forgotten that the agreement which the plaintiff sought to establish was not an agreement to be bound by writing, but the agreement to sell which had been completed by word of mouth, and to which the signature of the defendant, though required as evidence by the Statute of Frauds, was otherwise perfectly immaterial. See also *Allan* v. *Bower*, 3 B. C. C. 141. But of course a letter by which a party *abandons* an agreement which is set forth in an unsigned memorandum cannot be used to set up that agreement. It is no *acknowledgment* of the *particulars* of such agreement: *Gosbell* v. *Archer*, 4 Nev. & M. 485. The doctrine of *Stokes* v. *Moore*, 1 Cox, 223, does not apply to instructions regularly signed by the party, containing all the terms of the agreement, and delivered by him to his solicitor in order that a more formal instrument may be prepared: *Fowle* v. *Freeman*, 9 Ves. 351. See 1 Keen, 740.

Printed name.

If a man be in the habit of printing instead of signing his name, it seems he may be considered to sign by his printed name: per Lord *Eldon*, C. J., in deciding that a bill of parcels to which the vendor's name was printed, given by him to the buyer at the time of receiving an order given for the future delivery of the goods, was at all events taken out of the statute by a letter signed by the vendor, and referring to the bill of parcels, with which it was connected by the jury: *Saunderson* v. *Jackson*, 2 Bos. & P. 238. It would be sufficient if the printing of the name were shown to have been recognized by

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the party. Where the vendor wrote the name of the vendee on a bill of parcels on which his own name was printed, it was considered a sufficient signing to charge the vendor: *Schneider* v. *Norris*, 2 Mau. & S. 286.

Signature as witness.

Where one of the parties who is to be bound by an agreement subscribes the writing as a witness only, knowing the contents, it is sufficient to ratify the act: *Welford* v. *Beazeley*, 3 Atk. 503; 1 Ves. sen. 6; *Coles* v. *Trecothick*, 9 Ves. 251; *Symons* v. *Symons*, 6 Madd. 207. The signature of instructions for a telegram by the defendant, accepting an offer by letter for the purchase of an estate, was held to be a sufficient signature by the defendant under the Statute of Frauds to render him liable to be charged on the contract: *Godwin* v. *Francis*, L. R., 5 C. P. 295; see also *McBlaine* v. *Cross*, 25 L. T., N. S. 804. The signature may be in pencil, *Lucas* v. *James*, 7 Ha. 410, or by means of a stamp: *Bennett* v. *Brumfitt*, L. R., 3 C. P. 28.

Signature by initials, &c.

A signature by initials seems to be sufficient, *Phillimore* v. *Barry*, 1 Camp. 513; *Chichester* v. *Cobb*, 14 L. T., N. S. 433, or by mark: *Hubert* v. *Moreau*, 2 C. & P. 528; 12 Moo. 216. But it has been held not sufficient that the party *identifies* himself merely under his own handwriting; he must either put his name to the writing or do some other act intended by him to be equivalent to an actual signature; and a letter fully addressed, beginning "My dear Robert," and signed, "Your affectionate Mother," was held not to be properly signed: *Selby* v. *Selby*, 3 Meriv. 2; see also *Skelton* v. *Cole*, 1 De G. & J. 587. The altering of a draft without signature is not sufficient: *Hawkins* v. *Holmes*, 1 P. Wms. 770.

Agreement by several connected writings.

Any writing which is not properly signed may be taken out of the statute by a subsequent writing, duly signed, in which it is referred to with sufficient certainty: *Tawney* v. *Crowther*, 3 Br. C. C. 318; *Saunderson* v. *Jackson*, 2 B. & P. 238; *Phillimore* v. *Barry*, 1 Camp. 513; *Allen* v. *Bennett*, 3 Taunt. 169; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Dobell* v. *Hutchinson*, 5 Nev. & M. 251; *S. C.*, 3 Ad. & Ell. 355; *Rose* v. *Cunynghame*, 11 Ves. 550; *Blagden* v. *Bradbear*,

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12 Ves. 466; *Western* v. *Russell*, 3 Ves. & B. 187; *Owen* v. *Thomas*, 3 Myl. & K. 353; *Ridgway* v. *Wharton*, 6 H. L. C. 238; *Baumann* v. *James*, L. R., 3 Ch. 508. In *Gibson* v. *Holland*, L. R., 1 C. P. 1, a letter, signed by the party to be charged, written to his own agent, referring to letters of the agent, stating the terms on which the latter had made a contract on behalf of his principal, was held to be a sufficient note or memorandum to satisfy the Statute of Frauds. See also, as to letters to third persons, *Leroux* v. *Brown*, 12 C. B. at p. 817; 22 L. J., C. P. 1; *Clerk* v. *Wright*, 1 Atk. 12; *Welford* v. *Beazley*, 3 Atk. 503; *Bailey* v. *Sweeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 150; and Sugd. Vend. 139. Where the defendant returned an invoice, with a signed note stating "the cheeses came to-day, but I did not take them in, for they were badly crushed, so the candles and cheese is returned," it was held that the invoice was sufficiently referred to to constitute a memorandum of the bargain within the statute: *Wilkinson* v. *Evans*, L. R., 1 C. P. 407; see also *Buxton* v. *Rust*, L. R., 1 Ex. 279; *Leather Cloth Co.* v. *Hieronimus*, L. R., 10 Q. B. 140. But a deficiency in the internal evidence of connexion cannot be supplied by parol, *Hinde* v. *Whitehouse*, 7 East, 558; *Boydell* v. *Drummond*, 11 East, 142; *Peek* v. *North Staffordshire Rail. Co.*, 10 H. L. C. 473; 32 L. J., Q. B. 241, although of course the identity of the writing referred to may be so established: *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314; *Long* v. *Millar*, 4 C. P. D. 450; *Cave* v. *Hastings*, 7 Q. B. D. 125; see also *Shardlow* v. *Cotterell*, 20 Ch. D. 90.

And where an agreement for a lease was drawn up with reference to certain clauses contained in a paper which was read to the plaintiff, who filed his bill for a specific performance, according to such clauses as were read to him, the bill was dismissed: *Brodie* v. *St. Paul*, 1 Ves. jun. 326. See 15 Ves. 522; 1 Sch. & Lef. 38. The witnesses must of course be consistent with each other, and with the alleged agreement which they are produced to prove, for otherwise no complete agreement is made

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out: *Cooper* v. *Smith*, 15 East, 103; *Smith* v. *Surman*, 4 Man. & Ry. 455. And parol evidence is admissible by way of *defence* to show that the memorandum relied upon does not contain the true agreement: *Hinde* v. *Whitehouse*, 7 East, 558; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22. See *Hoadley* v. *Maclaine*, 4 M. & Sc. 340; *Malins* v. *Freeman*, 2 Keen, 25.

Agreement constituted by letters.

This brings us to the cases in which an offer made by letter, stating all the terms of the contract and the subject-matter with sufficient distinctness, and accepted on the other side, though without writing, has been held binding on the party making the offer, and also on the party accepting it, if his acceptance appear in writing with a sufficient signature, although a more formal agreement was contemplated: *Seagood* v. *Meale*, Pr. Ch. 560; *Kennedy* v. *Lee*, 3 Mer. 441; *Huddlestone* v. *Briscoe*, 11 Ves. 583; *Chinnock* v. *Marchioness of Ely*, 6 N. R. 1; *Crossley* v. *Maycock*, L. R., 18 Eq. 180. "It must be understood that the party seeking the specific performance of such an agreement is bound to find in the correspondence not merely a treaty, still less a proposal, for an agreement, but a treaty with reference to which mutual consent can be clearly demonstrated, or a proposal met by that kind of acceptance which makes it no longer the act of one party, but of both. It follows that he is bound to point out to the Court upon the face of the correspondence a clear description of the subject-matter, relative to which the contract was in fact made and entered into. *I do not mean* (because the cases which have been decided would not bear me out in going so far), *that I am to see that both parties really meant the same precise thing*, but only that both actually gave their assent *to that proposition*, *which*, *be it what it may*, de facto *arises out of the terms of the correspondence.* The same construction must be put upon a letter or series of letters that would be applied to the case of a formal instrument:" Per Lord *Eldon*, C., *Kennedy* v. *Lee*, 3 Mer. 451. See *Ogilvie* v. *Foljambe*, Ib. 53; *Huddlestone* v. *Briscoe*, 11 Ves. 591; *Stratford* v. *Bosworth*, 2 Ves. & B. 341; *Munday* v. *Asprey*, 13 Ch. D. 855. In *Bailey* v. *Sweeting*, 9 C. B., N. S. 843;

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30 L. J., C. P. 150, it was held that a letter which contained an admission of the bargain, and of all the substantial terms of it, was a sufficient memorandum to satisfy the statute, although the writer at the same time repudiated his liability. See also *Gibson* v. *Holland*, L. R., 1 C. P. 1.

Proposal of variation.

If, however, in the answer to the offer any new term or any variation is proposed, the agreement remains open for either party to recede from it until such new proposal is accepted on the other side. To conclude the agreement, the new terms must be accepted: it is not sufficient that the party merely does not dissent from them: *Routledge* v. *Grant*, 1 Moo. & P. 717; *Smith* v. *Surman*, 4 Man. & Ry. 455; *Jordan* v. *Norton*, 4 Mee. & W. 155; *Holland* v. *Eyre*, 2 Sim. & St. 194. See *Popham* v. *Eyre*, Lofft, 786. If the proposal do not in itself evidence all the terms of the agreement by which the party signing it consents to be bound, but it requires from the other party, not a simple assent to the terms stated, but a special acceptance, which is to supply a further term of the agreement, it is obvious that such special acceptance must be executed in writing, for otherwise the whole agreement will not be in writing as the statute requires: *Boys* v. *Ayerst*, 6 Mad. 324. See also *Taylor* v. *Portington*, 7 De G., M. & G. 328.

An agreement for a lease, whether contained in a single document, or inferred from a number of documents taken together, must be capable of interpretation so as to define with certainty the commencement and duration of the time, in order to constitute a binding contract: *Fitzmaurice* v. *Bailey*, 9 H. L. C. 78; 27 L. J., Q. B. 143; *Clarke* v. *Fuller*, 16 C. B., N. S. 24; *Nesham* v. *Selby*, L. R., 13 Eq. 191.

Acceptance of offer.

If an offer is not accepted within a reasonable time (and what is a reasonable time must be determined with reference to the circumstances of each case), the right of accepting it will be considered to have been abandoned; and if an offer is met by a different proposal the original offer is at an end, and the other party cannot retract his proposed

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variation and insist on the performance of the original offer: *Hyde* v. *Wrench*, 3 Beav. 334; *Thornbury* v. *Bevill*, 1 Y. & C. C. C. 554. The *contract* must be mutual, although the *evidence* of it need not be so (*ante*, p. 310), and until an offer is accepted it may be retracted by the party making it, *Gaskarth* v. *Lord Lowther*, 12 Ves. 107; and if he has given a certain time to the other to consider, he may retract before that time has expired, if his offer has not been previously accepted: *Routledge* v. *Grant*, 1 Moo. & P. 717. When the defendants by letter offered to sell goods to the plaintiff on certain terms, *receiving an answer by return of post*, and misdirected their letter, in consequence of which the plaintiff received it two days later than he should have done, and he answered by return of post accepting the offer; but, the day following that on which the answer was expected by the defendants, they sold the goods to a third person, it was held that as the delay arose from their mistake, it must be taken that, as against them, the answer was received by return of post, and by that a valid agreement was constituted: *Adams* v. *Lindsell*, 1 B. & Al. 681. A letter accepting a proposal is binding upon the writer as soon as posted: *Potter* v. *Saunders*, 6 Ha. 1; *Dunlop* v. *Higgins*, 1 H. L. Cas. 381; *Re Wall*, L. R., 15 Eq. 18. As to when a request for an answer by return of post is part of the offer, see *Johnson* v. *King*, 9 J. B. Moore, 482.

Time for accepting offer.

Signature by agent.

The 1st and 3rd sections of the Statute of Frauds require the appointment of an agent, signing within those sections, to be made by writing; but the words *by writing* are omitted in the 4th and 17th sections, and therefore, although the contract itself under either of those sections must be in writing, it may be made by an agent under a parol authority only: *Coles* v. *Trecothick*, 9 Ves. 234. See *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Barry* v. *Lord Barrymore*, Ib. 28; *Else* v. *Barnard*, 28 Beav. 228; *Heard* v. *Pilley*, L. R., 4 Ch. 548. But a mere parol authority should never be given or acted upon, on account of the difficulty of making out that it has been given, and the agent has acted consistently with it.

Agent may be appointed by parol.

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In order to make it the contract of the defendant, or by all the defendants, if more than one, the plaintiff must prove that he did by parol authorize the agent, without further consultation with him, to sell at the price: *Mortlock* v. *Buller*, 10 Ves. at p. 311. So proof of an authority to sell is not proof of authority to receive the money: *Mynn* v. *Joliffe*, 1 Mood. & R. 326; *Sykes* v. *Giles*, 5 Mee. & W. 645. See *Jordan* v. *Norton*, 4 Mee. & W. 155. That the drawing up of the terms of a contract by the solicitor for one of the parties, and the sending of the drafts to a conveyancer to be settled, after they have been read to and approved by both parties, is not such an agency as can bind either side. See *Earl of Glengall* v. *Barnard*, 1 Keen, 769; see also *Smith* v. *Webster*, 3 Ch. D. 49. In *Daniel* v. *Adams*, Ambl. 495, husband and wife, having a joint power to sell an estate of the wife's, gave a verbal authority to an agent to sell by auction; he sold by *private contract* for a greater sum than the *husband* alone had written to him to say he would take, and it was held that the purchaser could not compel a performance. See *Charlewood* v. *Duke of Bedford*, 1 Atk. 497; 5 Vin. Ab. 522, pl. 35. The agent is competent to prove the terms of his authority, but his evidence, if it go to discredit his signature as agent, will be regarded with suspicion. If he declare that he has no authority at the time he signs, his principal will not be bound: *Howard* v. *Braithwaite*, 1 Ves. & Bea. 202, 374. And see *Mason* v. *Armitage*, 13 Ves. 25. And here a difference may be noticed between the effect of admissions by an agent and that of admissions by the principal. The principal will always be bound by his own admission, but the admission of an agent is not binding on his principal unless it can be treated as being itself a lawful act of agency at the time. It cannot be relied on as conclusively establishing against the principal the fact of a prior contract having been made by the agent. So far as it is an act of agency, an admission by an agent binds the principal; so far as it relates to a prior act of agency, it is only *evidence* against him: *Fairlie* v.

Extent of agent's authority.

Effect of admissions by agent.

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Hastings, 10 Ves. 123. See *Bauerman* v. *Radenius*, 7 T. R. 663. Although a written contract cannot be varied by parol yet it may be shown by parol testimony that a person treated in the written memorandum as principal was agent for another: *Wilson* v. *Hart*, 7 Taunt. 295; 1 J. B. Moore, 45; *Sims* v. *Bond*, 2 Nev. & M. 608; *Jones* v. *Littledale*, 6 A. & E. 486; *S. C.*, 1 Nev. & P. 677; *Marston* v. *Roe* d. *Fox*, 2 Nev. & P. 504, 519, 530; *Trueman* v. *Loder*, 11 A. & E. 389; *S. C.*, 3 Per. & D. 267. See *Bartlett* v. *Pickersgill*, 1 Cox, 15; *S. C.*, 4 East, 577, n., where Lord Keeper *Henley*, decided against the admission of such evidence, it not being charged that any part of the purchase-money was paid by the plaintiff. See *Magee* v. *Atkinson*, 2 Mee. & W. 440.

Proof of agency.

Agent cannot act by deputy.

An agent who has a particular authority to sell cannot delegate his authority, so as to authorize his clerk to contract, unless there is a special agreement (either in writing or oral) for the purpose: *Coles* v. *Trecothick*, 9 Ves. 234; *Blore* v. *Sutton*, 3 Mer. 237; *Henderson* v. *Barnwall*, 1 You. & J. 387. See *Gosbell* v. *Archer*, 2 A. & E. 500; *S. C.*, 4 Nev. & M. 485; Sugd. Vend. 143. But the act of the clerk may be afterwards ratified: *Blore* v. *Sutton*, 3 Mer. 247; *Maclean* v. *Dunn*, 4 Bing. 722; 1 Moo. & P. 761. As to what is sufficient evidence to prove agency, see *Darrell* v. *Evans*, 1 H. & C. 174; 31 L. J., Ex. 337; *Murphy* v. *Boese*, L. R., 10 Ex. 126.

One person may be agent for all parties.

The agent must be some third person, and cannot be the other contracting party: *Wright* v. *Dannah*, 2 Camp. 203; *Sharman* v. *Brandt*, L. R., 6 Q. B. 720. See also *Farebrother* v. *Simmons*, 5 B. & Al. 333, *infra*, p. 324; *Dryden* v. *Frost*, 3 M. & Cr. 670. But the same person may be agent for both parties: *Hicks* v. *Hankin*, 4 Esp. 114; *Graham* v. *Musson*, 7 Scott, 769; and as to auctioneers, *infra*, p. 323

Revocation of agent's authority.

The principal may revoke the authority of the agent at any time before an agreement is executed according to the statute, notwithstanding the agent has completed a *verbal* agreement; for the authority contemplated by the statute is not an authority to *contract*, but an authority to *sign* for the principal.

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See *Farmer* v. *Robinson*, 2 Camp. 339, n.; *Short* v. *Spackman*, 2 B. & Ad. 962. On the other hand, it is settled, that the agent's authority need not exist at the time he makes his signature; it is sufficient if the contract be afterwards verbally adopted by the person indicated as principal; for *omnis ratihabitio retro-trahitur et mandato æquiparatur: Maclean* v. *Dunn*, 4 Bing. 722; *S. C.*, 1 Moo. & P. 761; *Keinitz* v. *Surry*, 5 Esp. 267; Paley, Prin. & Ag. 171, n., 3rd ed.; *Soames* v. *Spencer*, 1 Dowl. & Ry. 32; *Gosbell* v. *Archer*, 2 A. & E. 500; *S. C.*, 4 Nev. & M. 485. See further, tit. Power of Attorney, *post*.

Brokers.

On a sale transacted through the medium of a broker, he is the agent of both parties, and the bought and sold notes, signed and delivered by him to the buyer and seller respectively, constitute the proper evidence of the contract, and are binding, although there is no memorandum in the broker's book: *Rucker* v. *Cammeyer*, 1 Esp. 105; *Cumming* v. *Roebuck*, Holt, N. P. 172; *Grant* v. *Fletcher*, 8 Dowl. & Ry. 59; 5 B. & Cr. 436; *Groom* v. *Aflalo*, 6 B. & Cr. 117; *Thornton* v. *Meux*, 1 M. & Mal. 43; *Hawes* v. *Forster*, 1 Moo. & Rob. 368. And if the names of the parties appear from both notes together, it is sufficient: *Trueman* v. *Loder*, 11 A. & E. 589; *S. C.*, 3 Per. & D. 267. It was at one time thought that the broker's book was the proper evidence of the contract. See *Thornton* v. *Meux*, *Grant* v. *Fletcher*. The contract is constituted by the signed entry in the broker's book, or by any other writing or writings properly connected and signed within the statute, so that the parties cannot afterwards recede from it; and the want of proper bought and sold notes is not then material: *Heyman* v. *Neale*, 2 Camp. 337; *Thornton* v. *Charles*, 9 M. & W. 802; 13 M. & W. 743; *Sievewright* v. *Archibald*, 17 Q. B. 115; 20 L. J., Q. B. 529; *Thompson* v. *Gardiner*, 1 C. P. D. 777. And see Benjamin on Sales, 3rd ed., 236 *et seq.*, where the cases are ably reviewed. If the bought and sold notes disagree as to any material part of the contract, it will not be enforced, and an unsigned entry in the broker's book will not supply the defect: *Thornton* v. *Kempster*, 1 Marsh, 355; 5

Signature by broker.

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Taunt. 786; *Grant* v. *Fletcher*, 8 Dowl. & Ry. 59. See *Maclean* v. *Dunn*, 1 Moo. & P. 761. Evidence of mercantile usage is admissible to explain an apparent variance between the notes: *Bold* v. *Rayner*, 1 Mee. & W. 343; and per *Erle*, C. J., in *Sievewright* v. *Archibald*, 17 Q. B. 124; 20 L. J., Q. B. 529. In *Thornton* v. *Meux*, *ubi supra*, a variance between the bought and sold notes was not allowed to be explained by reference to the broker's book, which, it is presumed, though not so stated, was signed. This was not followed in *Hawes* v. *Forster*, *ubi supra*; and see *Gale* v. *Wills*, 1 Car. & P. 388, an earlier decision. In *Thornton* v. *Charles*, *ubi supra*, there was a great difference of opinion on the point; and see *Sievewright* v. *Archibald*, *ubi supra*. A note, signed by either of the principals, will be enforced against him, notwithstanding a variance between it and the note delivered to him: *Rowe* v. *Osborne*, 1 Stark. 140. An error in the memorandum that is proved to be immaterial will not avoid the contract; as, where the broker wrote down the old name of the firm after a change had taken place, of which he was ignorant: *Mitchell* v. *Lapage*, Holt, N. P. 253. A material alteration in either note, without the consent of the other party, will discharge him: *Powell* v. *Divett*, 15 East, 29.

Signature by auctioneer.

An auctioneer is of course the agent of the vendor, and may bind him by his signature: *Hinde* v. *Whitehouse*, 7 East, 558; and it is now settled, contrary to former decisions and opinions (*a*), that in sales of lands, as well as of goods, the bidding of the purchaser constitutes him the purchaser's agent also; and that his writing down the purchaser's name is a signature as such agent, and this although the bidder himself is only an agent: *Emmerson* v. *Heelis*, 2 Taunt. 38; *White* v. *Proctor*, 4 Ib. 209; *Kemeys* v. *Proctor*, 3 Ves. & B. 57; *S. C.*, 1 Jac. & W. 250; *Farebrother* v. *Prattent*, 5 Pri. 303; *S. C.*, Dan. 64;

(*a*) See *Stanfield* v. *Johnson*, 1 Esp. 101; *Walker* v. *Constable*, 2 Id. 659; 1 Bos. & P. 306; *Buckmaster* v. *Harrop*, 7 Ves. 341; 13 Id. 35, 456, 473; *Coles* v. *Trecothick*, 9 Id. 234, 249; 13 Ves. 473; Sug. Vend. 147.

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Kenworthy v. *Schofield*, 4 Dowl. & Ry. 556; 2 B. & Cr. 945. See *Coles* v. *Trecothick*, 9 Ves. 249; 13 Ves. 473. And it seems, if the name of the owner of the estate is not disclosed at the sale, the auctioneer's signature binding himself is necessary, in addition to that of the buyer, in order to complete the agreement, for otherwise the name of the vendor does not appear: *Wheeler* v. *Collier*, 1 M. & Mal. 123.

Implication of agreeing may be rebutted.

The auctioneer, however, is not, *ex vi termini*, agent for both parties: whether such agency shall be inferred depends upon the facts of the particular case: and he is not agent for the vendee in the case of a sale by private contract subsequent to the auction: *Mews* v. *Carr*, 1 H. & N. 484; 26 L. J., Ex. 39; *Bartlett* v. *Parnell*, 6 Nev. & M. 299; 4 Ad. & Ell. 792.

Signature by auctioneer's clerk.

The signature by the auctioneer's clerk has been held to be sufficient. The auctioneer and his clerk may be considered as the constituted agents of the vendor: he appoints the former to announce the biddings and the latter to take down the names of the purchasers and the prices of the lots. The clerk may be considered not only as the agent of the vendors but also (during the continuance of the sale) of the purchasers: *Bird* v. *Boulter*, 4 B. & Ad. 447; *S. C.*, 1 Nev. & M. 313; *Malins* v. *Freeman*, 2 Keen, 25; *Mews* v. *Carr*, 1 H. & C. 484; *S. C.*, 26 L. J., Ex. 39. But see *Peirce* v. *Corf*, L. R., 9 Q. B. 210.

In an action by the auctioneer himself (see *Williams* v. *Millington*, 1 H. Bl. 81), it was held, on the authority of *Wright* v. *Dannah*, 2 Camp. 203, *ante*, p. 321, that the auctioneer, suing as principal, could not insist on his signature as agent for the defendant: *Farebrother* v. *Simmons*, 5 B. & Al. 333. See also *Bird* v. *Boulter*, 4 B. & Ad. 443.

Signature by clerk as witness.

But where the plaintiff purchased lands at an auction, and signed a memorandum of the contract, which J. N., the auctioneer's clerk, also signed *as witness*, and J. N., being authorized to do so, received the deposit and half the auction duty, according to the conditions of sale, and signed a receipt for them for the auctioneer, it was held that the clerk could

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not be treated as agent for the vendor; he could not sign both as witness and as party, and his signature purported to be made in the former character. He might have known nothing of the particulars of the contract: *Gosbell* v. *Archer*, 4 Nev. & M. 485; 2 Ad. & E. 500. See 9 Ves. 251; and *ante*, p. 321. See also observations of Lord *St. Leonard's*, Sugd. Vend. 147.

Agreement signed by auctioneer must be complete.

In order to bind the parties, the agreement to be signed by the auctioneer must be in all respects a complete agreement, just as much as in other cases. Thus, where the auctioneer wrote the purchaser's name against the lots purchased by him in a catalogue without more, the catalogue not being annexed to the conditions of sale, nor containing any reference to them, it was held that the conditions might be given in evidence to prove that the true contract was not contained in the memorandum, and that there was not a sufficient memorandum to satisfy the 17th section: *Hinde* v. *Whitehouse*, 7 East, 558; *Kenworthy* v. *Schofield*, 4 Dowl. & Ry. 556; 2 B. & Cr. 945. So the auctioneer's receipt for the deposit, if it do not show the terms of the sale, is insufficient: *Blagden* v. *Bradbear*, 12 Ves. 466.

IV.—Statement of Consideration for Agreement, &c.

Consideration to support a contract.

Statement of Consideration.]—In the case of *Rann* v. *Hughes*, 4 Bro. P. C. 27; *S. C.*, 7 T. R. 350, *in notis*, *Skynner*, C. B., in delivering the opinion of the judges to the House of Lords, observed, that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudum pactum*, *ex quo non oritur actio;* and writing makes no difference; for, that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. All contracts are by the law of England distinguished into agreements by specialty and agreements by parol: nor is there any such third class as *contracts in writing*. If they be

Two classes of contracts only.

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merely written, and not specialties, they are parol, and a consideration must be proved. The words of the Statute of Frauds are merely negative, and still leave the agreement liable to be tried and judged of, as all other agreements merely in writing are, by the common law: *Eastwood* v. *Kenyon*, 11 A. & E. 438; *S. C.*, 3 Per. & D. 282.

In preparing written agreements, consideration should be stated.

In preparing agreements, therefore, which are required by statute to be in writing, care should be taken to express the consideration, for, according to the doctrine of several cases, this being essential to the validity of the agreement, cannot be supplied by oral testimony, and the consideration should be such as to operate as a *present* inducement to the obligation contracted, or, in other words, should refer to something *about* to be done, and not be a past and bygone consideration: *Wood* v. *Benson*, 2 Cr. & J. 94; *Haigh* v. *Brooks*, 11 A. & E. 309; *S. C.*, 4 Per. & D. 288: *Raikes* v. *Todd*, 1 Per. & D. 138; though unquestionably, in some of the cases, the instrument seems to have been supported by a consideration of the latter species: *Boehm* v. *Campbell*, 3 J. B. Moore, 15; *Pace* v. *Marsh*, 8 Id. 59. It is not possible, indeed, to reconcile all the cases upon the subject. See *Wain* v. *Warlters*, 5 East, 10; *Ex parte Minet*, 14 Ves. 190; *Ex parte Gardom*, 15 Id. 286; *Stadt* v. *Lill*, 9 East, 348; *Jenkins* v. *Reynolds*, 6 J. B. Moore, 86; 3 Br. & B. 14; *Saunders* v. *Wakefield*, 4 B. & Al. 595; *Stead* v. *Liddard*, 8 J. B. Moore, 2; 1 Bing. 196; *Morley* v. *Boothby*, 10 J. B. Moore, 395; 3 Bing. 107; *Clancy* v. *Pigott*, 4 Nev. & M. 496; 2 Ad. & El. 473; *Cole* v. *Dyer*, 1 Cr. & J. 461; *Bushell* v. *Beavan*, 4 Mas. & Sc. 622; *Hawes* v. *Armstrong*, 1 Scott, 661; *James* v. *Williams*, 13 M. & W. 828; 5 B. & Ad. 1109; *Bentham* v. *Cooper*, 5 Mee. & W. 621. As to a promise by an executor or administrator to answer damages out of his own estate, see *Rann* v. *Hughes*, 7 T. R. 350, n.; 4 Br. P. C. 27, Toml. ed.; Selw. N. P., 13th ed. 766; *Tomlinson* v. *Gill*, Ambl. 330. But certainly the leaning of the latter cases has been in favour of requiring the consideration to be stated. In *Morley* v. *Boothby*, the undertaking was in these words: "Messrs. *M. & Co.*,

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we hereby promise that your draft on *Wm. Clarke, Son & Co.*, due at Messrs. *Mastermans'*, at six months, on the 27th November next, shall be then paid out of money to be received from St. Philip's Church; say amount 174*l.* 13*s.* 5*d.*—*W. Clarke*, *W. Boothby*." It was held, that as there was no apparent benefit accruing to the debtors, nor any inconvenience sustained by the creditors, in consequence of this arrangement, it was without consideration on the face of it, and therefore the plaintiff could not recover. Where the act requires an "acknowledgment" only to be in writing, it is apprehended that the principle of the preceding cases does not apply. The recent cases have conclusively settled the rule in accordance with the decision in *Wain* v. *Warlters*, *ubi supra*, that the consideration must appear on the face of the writing, or be deducible by reasonable intendment from its terms; the ground of the decisions being, that the term *promise* in the statute, as explained by the use of the word *agreement*, in the concluding part of the clause, includes both the consideration for the promise and the promise itself. It is not, however, necessary that such consideration should appear in *express terms;* it would undoubtedly be sufficient in any case, if the memorandum were so framed that any person of ordinary capacity must infer from the perusal of it that such and no other was the consideration upon which the undertaking was given: *Hawes* v. *Armstrong*, 1 Scott, 661; *Bentham* v. *Cooper*, 5 Mee. & W. 621. See also *Gibson* v. *Holland*, L. R., 1 C. P. 1. For instances in which the consideration has been implied from the terms of a guarantee (upon contracts of which nature most of the cases have arisen), see *Russell* v. *Moseley*, 6 J. B. Moore, 521; *Stadt* v. *Lill*, 9 East, 348; where, from the following undertaking, "I guarantee the payment of any goods which Mr. S. shall deliver to Mr. N.," it was collected that the promise was made as an inducement to the furnishing of the goods: *Lysaght* v. *Walker*, 5 Bligh, 1; *Newbury* v. *Armstrong*, 3 Moo. & P. 509; *Ryder* v. *Curtis*, 8 Dowl. & Ry. 62; *Shortrede* v. *Cheek*, 3 Nev. & M. 866; *Dutchman* v. *Tooth*, 7 Scott, 710; *Kennaway* v. *Treleavan*, 5

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Mee. & Wel. 498. A contingent consideration is sufficient (*a*); but of course the liability upon the guarantee does not arise until the condition is performed: *Warrington* v. *Furbor*, 6 Esp. 89; *Stadt* v. *Lill*, 9 East, 348; *Hemming* v. *Trenery*, 2 Cr., M. & R. 385. From this dependence of the liability under the guarantee on the performance of the consideration, it follows that the agreement must show not only that there is a consideration, but also what the consideration is: *Cole* v. *Dyer*, 1 Cr. & J. 461. See *Shortrede* v. *Cheek*, 3 Nev. & M. 866.

What a sufficient consideration.

The forbearance of an existing debt, or of other legal or equitable rights is, of course, a good present consideration: *Fish* v. *Hutchinson*, 2 Wils. 94; *Kirkham* v. *Marter*, 3 B. & Al. 613; *Alliance Bank* v. *Broom*, 2 Dr. & Sm. 289; *Bracewell* v. *Williams*, L. R., 2 C. P. 196. So also the abandonment of an action to enforce a doubtful right: *Stracey* v. *Bank of England*, 4 M. & P. 639; *Llewellyn* v. *Llewellyn*, 15 L. J., Q. B. 4: and the compromise of a disputed claim, made *bonâ fide*, even though it ultimately appears that the claim was wholly unfounded: *Callisher* v. *Bischoffsheim*, L. R., 5 Q. B. 449; but see the observations of *Brett*, L. J., on that decision in *Ex parte Banner*, 17 Ch. D. 490. If the abandonment of a contract is relied upon as the consideration for an agreement, it must be shown that there was a valid contract: *Walker* v. *Constable*, 1 Bos. & P. 306. This principle obviously applies as much where the promise is founded on the supposed liability of a third person, as where it is founded on that of the party himself who promises. Any damage, or any suspension or forbearance of his right, or any possibility of loss occasioned to the plaintiff by the promise of another,

(*a*) This must be understood of a consideration for the entire promise; for a mere promise to pay the existing debt of A., and also future advances to him, does not seem to be good as to the past debt, since the future advances are, unless otherwise expressed, presumed to be only a consideration for the promise to pay *them*. See *Russell* v. *Moseley*, 6 J. B. Moore, 521; *Raikes* v. *Todd*, 1 Per. & D. 138; *Wood* v. *Benson*, 2 Cr. & J. 95, and *ante*, p. 302.

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is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party undertaking: 1 Wms. Saund. 211, n. *b*. See *Dutchman* v. *Tooth*, 7 Scott, 710; *Emmett* v. *Kearns*, Ib. 687; *Peate* v. *Dicken*, 1 Cr., M. & R. 422; *Herring* v. *Dorell*, 8 D. P. C. 604; see also *Haigh* v. *Brooks*, 4 Per. & D. 288; 10 Ad. & E. 309. So in *Dashwood* v. *Jermyn*, 12 Ch. D. 781, *Bacon*, V.-C., said that a promise to the *debtor* to pay his debt is not within the clause: *Eastwood* v. *Kenyon*, 11 A. & E. 438; *S. C.*, 3 Per. & D. 276; *Rattenbury* v. *Fenton*, 3 Myl. & K. 505. A promise to indemnify the plaintiff from the consequence of becoming bail for a third person is within the clause: *Green* v. *Cresswell*, 10 Ad. & E. 453; 2 Per. & D. 430. See further, as to the consideration requisite to support an assumpsit, *Eastwood* v. *Kenyon*, 11 A. & E. 438; *S. C.*, 3 Per. & D. 276, and cases there cited.

As to statement of consideration in memorandum of bargain under sect. 17.

In the 17th section, the word *agreement* does not occur; but a memorandum or note of the *bargain* is required; and from this difference between the wording of the 4th and the 17th sections, it has been held, that the terms of the bargain are not required to be so distinctly expressed under the latter clause, as those of the agreement must be under the former. Thus, in an action on the following memorandum:—"We agree to give Mr. E. 19*d*. per lb. for thirty bales of Smyrna cotton, customary allowance, cash three per cent. as soon as our certificate is complete; (signed) M. & T.," and dated; it was objected, that the contract was executory, and that no consideration appeared on the writing for the promise, nor any mutuality in the engagement. But the Court distinguished the case of *Wain* v. *Warlters*, on the ground of the different wording of the 4th section, and held the memorandum sufficient: *Egerton* v. *Mathews*, 6 East, 307; see also *Sarl* v. *Bourdillan*, 26 L. J., C. P. 78; 1 C. B., N. S. 188. But the price agreed to be paid constitutes an essential part of the bargain. "If it were competent to a party to prove by parol evidence the price intended to be paid, it would let in much of the

Statement of price.

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mischief which it was the object of the statute to prevent:" *Elmore* v. *Kingscote*, 5 B. & Cr. 584; 8 Dowl. & Ry. 344. If the contract is for the sale of the goods at a reasonable price, or at the market value, a memorandum, stating as much, will be a memorandum *of the bargain*, sufficient to satisfy the Act. And even where the memorandum is not thus explicit, and merely omits any mention of the price, the statute will be satisfied, if it can be presumed from the nature of the bargain that no fixed price, but a reasonable value, was agreed upon: *Hoadly* v. *Maclaine*, 10 Bing. 482; *S. C.*, 4 Moo. & Sc. 340. See *Acebal* v. *Levy*, Id. 217. And as to contracts for the sale of land, by valuation, &c., see *Cooth* v. *Jackson*, 6 Ves. 17; *Milnes* v. *Gery*, 14 Ves. at p. 408; *Blundell* v. *Brettargh*, 17 Ves. 232. Of course a statement of the price is equally essential in agreements which come under the 4th, as in those which are regulated by the 17th section: *Clerk* v. *Wright*, 1 Atk. 12; *Blagden* v. *Bradbear*, 12 Ves. 466; *Milnes* v. *Gery*, 14 Ves. 408.

Contract for sale at a *reasonable* price.

All the terms of the agreement must be reduced to writing.

Certainty of the agreement.

Certainty of the Agreement.]—With respect to agreements for sales of real estate, the writing which is relied upon to establish an agreement must, by its own contents, state the terms of the agreement, describe the property sufficiently, and state the price to be given for it, and the terms upon which it is given and received; or, if its own inherent contents are not sufficient to evidence so much, it must, by its contents, refer to some other instrument, containing the terms of the agreement, so that, by its contents, the whole agreement may be ascertained. Very nice and difficult questions may arise upon that; how far a paper of this sort will take a case out of the statute, if you are obliged to make out all these particulars by parol evidence: 9 Ves. 251. As to the certainty which is requisite to an agreement, see also *Clerk* v. *Wright*, 1 Atk. 12; *Rose* v. *Cunynghame*, 11 Ves. 550; *Stokes* v. *Moore*, 1 Cox, 219; *Blore* v. *Sutton*, 3 Mer. 237; *Collett* v. *Butler*, 3 Swanst. 402; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Clowes* v. *Higginson*, 1 Ves. & B. 524; *Price* v.

Assheton, 1 You. & C., Ex. 441; *Hutchinson* v. *Bowker*, 5 Mee. & W. 535; *Plevius* v. *Downing*, 1 C. P. D. 220; *Long* v. *Millar*, 4 C. P. D. 450. If the written agreement does not contain all the terms actually agreed upon when it was made, performance of it will not generally be enforced, unless the party asking for such performance consents to take it, with the addition of the omitted provisions. As to the effect of parol evidence in controlling writen instruments, *vide infra*, sect. VI.

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V. Declarations of Trusts within the Seventh Section.

The 7th section applies to chattels real: *Riddle* v. *Emerson*, 1 Vern. 108; but not to a share in a mining copartnership: *Forster* v. *Hale*, 5 Ves. 308; nor to money secured by mortgage: *Benbow* v. *Townsend*, 1 Myl. & R. 506; it applies to copyholds: *Withers* v. *Withers*, Amb. 151; *Goodright* d. *Langfield* v. *Hodges*, 1 Watk. Cop. 227; *Acherley* v. *Acherley*, 7 Br. P. C. 273; *Devenish* v. *Bains*, Pr. Ch. 5; 2 Eq. Ab. 43, c. 4, where it was agreed that copyholds were not within the Act, was decided on the ground of fraud; but the Court thought that as an estate might, by the custom, be created by parol, a trust might also be so created (*a*). As to charitable trusts, see *Lloyd* v. *Spillet*, 3 P. W. 344; 2 Atk. 148; *Adlington* v. *Cann*, 3 Atk. 146; *Boson* v. *Statham*, 1 Eden, 513. But the Crown, it seems, not being named, is not bound by the statute: *Rex* v. *Portington*, 1 Salk. 162. See *Adlington* v. *Cann*, 3 Atk. 147, 154, and *infra*, tit. Mortgages. Personal estate is not within the clauses relating to trusts: *Benbow* v. *Townsend*, 1 Myl. & K. 506. See *Gibbons* v. *Caunt*, 4 Ves. 847; *Peckham* v. *Taylor*, 31 Beav. 250; *Grant* v. *Grant*, 34 Beav. 623; *Lister* v. *Hodgson*, L. R., 4 Eq. 30. See also, as to what will constitute a sufficient parol

What trusts within the statute.

(*a*) But as to this, see *Riddle* v. *Emerson*, 1 Vern. 108; Eq. Ab. 381, pl. 3, where it was held, that though a lease for three years might be granted by parol, the trust of such lease could not be declared by parol.

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declaration of trust with regard to personalty, *Paterson* v. *Murphy*, 11 Ha. 88; *Dipples* v. *Corles*, Ib. 183; *Jones* v. *Lock*, L. R., 1 Ch. 25; *Moore* v. *Moore*, L. R., 18 Eq. 474. And the statute does not apply to colonies planted before the Act was passed: 2 P. W. 75; *Gardiner* v. *Fell*, 1 J. & W. 22.

Uses.

Uses which are executed by the statute were said by Lord *Hardwicke* not to be within this clause: 1 P. Wms. 112; but in *Lord Altham* v. *Earl of Anglesey*, Gilb. Eq. Rep. 16; and in *Roe* d. *Roach* v. *Popham*, Doug. 25, it was held that a resulting use might be rebutted by parol. See cas. temp. *Holt*, 733. Uses seem to fall within the first section. See *Wright* v. *Lord Cadogan*, 2 Eden, 257.

What is a sufficient declaration of trust.

It is not required by the statute that a trust should be *created* by writing, but that it shall be manifested and proved by writing. It is not necessary that the trustee should have been such from the first; it is sufficient if it appear at any time in writing under the hand of a person having a right to declare himself a trustee: Per Lord *Alvanley* in *Forster* v. *Hale*, 3 Ves. at p. 707. See *Ambrose* v. *Ambrose*, 1 P. Wms. 321; *Ryall* v. *Ryall*, Amb. 413; 2 Eden, 257; 12 Ves, 74; *Davies* v. *Otty*, 35 Beav. 540; *Smith* v. *Matthews*, De G., F. & J. 139. The trust may be proved, in the same manner as agreements under the 4th section, by letters or other detached and informal writings, clearly connected with each other and properly signed, and leaving no doubt as to all the terms of the trust: *Forster* v. *Hale*, 3 Ves. 696; *O'Hara* v. *Neill*, 7 Br. P. C. 227; *Stubbs* v. *Sargon*, 2 Keen, 255; *Childers* v. *Childers*, 1 De G. & J. 482; *Bentley* v. *Mackay*, 15 Beav. 12. So a trust may be evidenced by a recital in a deed executed by the trustee: *Deg* v. *Deg*, 2 P. Wms. 412; or, formerly, by his answer to a bill, &c.: *Hampton* v. *Spencer*, 2 Vern. 288; 1 Atk. 59; *Cottington* v. *Fletcher*, 2 Atk. 155. As to declarations of trust in connexion with testamentary acts, and the effects of fraud in excluding the statute, see cases cited *infra*, tit. WILLS, and in *Podmore* v. *Gunning*, 7 Sim. 644.

Parol proof of trusts.

A trust may be proved by parol, notwithstanding

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the statute, if it be made out by *written* evidence that the person apparently entitled in equity is not really so; as in *Cripps* v. *Jee*, 4 Br. C. C. 472. See *Leman* v. *Whitley*, 4 Russ. 423.

Implied and resulting trusts.

By the 8th section, trusts upon a conveyance which arise or result by the implication or construction of law, or are transferred or extinguished by any act or operation of law, are excepted from the operation of the Act. One of the most obvious instances of a resulting trust is where one man takes a conveyance of the legal estate, and another pays the money. "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or *successive*, results to the man who advances the purchase-money. It is the established doctrine of a Court of Equity, that this resulting trust may be rebutted by circumstances in evidence." Per *Eyre*, C. B., *Dyer* v. *Dyer*, 2 Cox, 93. See *Anon.* 2 Vent. 361; 2 Vern. 67; *Lewis* v. *Lane*, 2 My. & K. 449. The rule as to resulting trusts applies to a joint advance and a conveyance to one only. See *Wray* v. *Steele*, 2 Ves. & B. 388; see also *Palmer* v. *Young*, 1 Vern. 276. If a person is employed by another to purchase an estate, and pays all the money himself, there is no constructive trust within the 8th section: *Bartlett* v. *Pickersgill*, 1 Cox, 15; 1 Eden, 515. See *Rastel* v. *Hutchinson*, 1 Dick. 44; *O'Hara* v. *O'Neill*, 2 Br. P. C. 39. But where a trustee purchases an estate with trust money, and takes the conveyance in his own name, and it appears on the face of the deed, or by writing under the trustee's hand, or even by mere parol evidence or implication, provided it is unquestionable, a trust will result in favour of the owners of the money: *Deg* v. *Deg*, 2 P. Wms. 412; *Lane* v. *Dighton*, Amb. 409; *Sowden* v. *Sowden*, 1 Br. C. C. 582; *Parry* v. *Philips*, 4 Ves. 108; *Wilson* v. *Foreman*, 2 Dick. 593. See 2 Fonbl. Eq. 119, n., 5th ed.; and *infra*, p. 337.

Purchase in name of a third person.

Trusts by implication.

Purchase in the name of another.

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Where money is actually paid, then the trust arises from the payment of the money, and not from any agreement of the parties. And where a lease is granted at rack-rent to A., upon an understanding that B. is to have a joint interest with A., and no fine is paid, the subsequent payment of a moiety of the rent by B. does not raise a trust in his favour by implication: *Riddle* v. *Emerson*, 1 Vern. 108. But if A. takes a renewal in the name of B., and pays the fine, a trust results to A.: *Maddison* v. *Andrew*, 1 Ves. sen. 59. It is contended by Mr. Sanders (Uses and Trusts, Vol. I., p. 354, 5th ed.), that, in order to raise a trust of this kind, the fact of the ownership of the money should appear upon the face of the deed, either by a recital or by expressions which amount to a necessary implication or presumptive proof of it, or else that it should be admitted by the nominal purchaser by some writing sufficient to raise a trust within the 7th section; and he cites *Kirk* v. *Webb*, Pr. Ch. 84; *Newton* v. *Preston*, Id. 103; *Denton* v. *Davis*, 18 Ves. 499, of which authorities the two former seem to bear out his proposition, though the latter certainly does not; but it is conclusively established by numerous authorities that parol evidence is admissible for the purpose of raising a constructive trust: see *Weall* v. *Rice*, 2 Russ. & M. 252; and this, whether the money is expressly stated in the conveyance to have been paid by the nominal purchaser or not. Thus, in *Willis* v. *Willis*, 2 Atk. 71; Amb. 413, Lord *Hardwicke* said that he who paid the money must clearly prove the payment; but there is another way of taking a case out of the statute, and that is, by admitting parol evidence within the rules laid down in this Court, to show the trust from the mean circumstances in the pretended owner, which makes it impossible for him to be the purchaser. So, in *Lench* v. *Lench*, 10 Ves. 517, Sir *W. Grant*, M. R., said: "It is now settled that money may in this manner be followed into the land in which it is invested, and a claim of this sort may be supported by parol evidence." Again, in *Wray* v. *Steele*, 2 Ves. & B. 388, Sir *T. Plumer*,

Payment of money may be proved by parol.

Purchase with another's money.

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V. C., directed an inquiry after the death of the nominal purchaser, it being stated that a part of the money had been advanced by another person, and an account in the handwriting of the nominal purchaser been produced. See also *Ex parte Vernon*, 2 P. Wms. 549; *Ryall* v. *Ryall*, 1 Atk. 59; Amb. 413; *Lane* v. *Dighton*, Amb. 409; *Bartlett* v. *Pickersgill*, 1 Cox, 15; and see *Sir J. Peachey's case*, Sugd. Vend. 702, n.

Implied trusts.

But very clear evidence is requisite to establish a trust of this kind. Evidence of declarations by the deceased trustee, where there are no corroborating circumstances by any writing under his hand, is in all cases most unsatisfactory, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the mistake or failure of recollection may totally alter the effect of the declaration. In most of the cases there has been at least something in writing; some account by which it appeared that the fund was laid out: Per Sir *W. Grant*, 10 Ves. 517. See *Gascoigne* v. *Thwing*, 1 Vern. 366; *Cooth* v. *Jackson*, 6 Ves. 39; *Groves* v. *Groves*, 3 Y. & J. 163, 170.

Resulting trust upon a partial declaration of trust.

A trust arises by implication, where, upon a conveyance or devise, a trust is declared only as to part, which is an implied exclusion of the grantee from any further benefit, and then what remains results to the grantor or his representatives: *Lane* v. *Dighton*, Ambl. 411; 2 Atk. 150; Barn. 388; *Davidson* v. *Foley*, 2 Br. C. C. 203; *Langham* v. *Nenny*, 3 Ves. 467. See *Cook* v. *Hutchinson*, 1 Keen, 42.

No resulting trust upon a conveyance without consideration.

The analogy between resulting uses and trusts is not quite so strict as might be inferred from the remarks of *Eyre*, C. B., in *Dyer* v. *Dyer* (*ante*, p. 333); for although, upon a conveyance at common law, without any consideration expressed, or use declared, a use will result to the grantor, a trust will not result upon a conveyance or lease made without consideration, or, which is the same thing, upon a nominal consideration: *Lloyd* v. *Spillet*, 2 Atk. 150; Barnard, 387; *Young* v. *Peachy*, 2 Atk. 257; *Lady Bellasis* v. *Compton*, 2 Vern. 294; *Leman* v. *Whitley*,

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4 Russ. 423 (*a*). And where a valuable consideration is expressed, and the evidence shows that it was not paid, nor meant to be paid, equity will not raise a constructive trust of the land in favour of the grantor, but only gives him a lien upon it for the money: *Leman* v. *Whitley*, *ubi supra*. It follows that, unless there is fraud or mistake, parol evidence is not admissible to raise a trust in cases of this kind. In *Birch* v. *Blagrave*, Ambl. 264, a trust was held to result upon a conveyance by a father to his daughter, expressed to be in consideration of natural love and affection.

Trusts implied against volunteers, purchasers, &c. with notice.

Another class of cases referred by some writers to the head of trusts arising by implication of law, is where the trust already exists in respect of the subject-matter to which it relates; but by the transfer of the subject to another person, without any declaration of trust, the trust is raised by implication against such person. See 1 Sand. Uses, 350, 5th ed. Such are the cases of a devolution of the property from the trustee by act of law upon his real or personal representative, assignees in bankruptcy, &c.; a forfeiture; a transfer by the trustee to a volunteer, with or without notice of the trust; a sale, lease, or other alienation which amounts to a breach of trust, to a purchaser for value, *with* notice. As the fact of notice or want of consideration may always be made out by parol, these are properly instances of trusts which may arise by implication, without writing. But it is unnecessary to take any particular note of trusts of this kind, because it is clear that they are not included in the 8th section, inasmuch as the 7th section, to which the 8th is appended, contemplates exclusively the declaration or creation of trusts in respect only of the property upon which they attach in the first instance, and

(*a*) In the case of *The Duke of Norfolk* v. *Browne*, Eq. Ab. 381, pl. 4, Pr. Ch. 80, the plaintiff's father had executed a grant of the next avoidance of a church to the defendant's father, who was a clergyman, and a person much intrusted by him; and the grantee knew nothing of the grant, and, being examined in a cause, deposed, that he did not purchase it of the duke; and it was held to be a resulting trust for the grantor.

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not in respect of the persons against whom they may become successively enforceable. Indeed it may be doubted whether resulting trusts are at all within the words or spirit of the 7th section, and whether, therefore, the exception of them by the 8th was not superfluous.

Implied trust, when the trust property is converted.

Another class of constructive trusts is, where the original estate or property which was subject to the trust is either destroyed or so disposed of as not to be available for the benefit of the *cestui que trust*, and some equivalent is obtained by the trustee, which is not, like money, destitute of "ear-mark," and may be followed and appropriated by a Court of Equity to the use of the *cestui que trust*. Thus, if a trustee purchase land or stock with trust money, the land or stock will be impressed with the trust, as in the analogous cases already discussed, where the conveyance is made to one person, and the money advanced by another. But where the trust does not authorize the purchase of land, it seems that the *cestui que trust* are not entitled to it in specie, but only to a lien against it: *Lane* v. *Dighton*, Ambl. 409; *Ryall* v. *Ryall*, 1 Atk. 59; Ambl. 413; *Lench* v. *Lench*, 10 Ves. 517; *Lewis* v. *Madocks*, 17 Ves. 48; *Savage* v. *Carroll*, 1 Ball & B. 265. The trust which arises in cases of this kind is properly a resulting trust within the exception in the statute; and it was decided in the above cases that the nature of the transaction, and the fact of the appropriation of the money, might be made out by parol evidence. Notwithstanding some early cases to the contrary (*a*), the doctrine stated above is well settled. If it is not part of the trustee's duty to purchase land, the application of the money must be distinctly proved. See *Denton* v. *Davies*, 18 Ves. 499, and cases cited, *supra*. But where the money is affected by a trust for investment in land, and no other account can be given of it, the presumption that the land was purchased with it will easily

Parol evidence of conversion.

Money may be followed into land.

Distinction where there is no trust for investment in land.

(*a*) See *Kirk* v. *Webb*, Pr. Ch. 84; *Heron* v. *Heron*, Pr. Ch. 163; *Halcott* v. *Markant*, Pr. Ch. 168; *Kinder* v. *Miller*, Pr. Ch. 172; *Deg* v. *Deg*, 2 P. Wms. 414.

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arise: *Sowden* v. *Sowden*, 1 Br. C. C. 582; *Lechmere* v. *Lechmere*, For. 80; *S. C.*, Cas. t. Tab. 90. In *Perry* v. *Phelips*, 4 Ves. 108; 17 Ves. 173, land purchased with moneys to which the trustee conceived himself entitled, but which he should have invested in land, was held not to be subject to the trust. See *Savage* v. *Carroll*, 1 Ball & B. 265.

Renewals, &c. by trustees, &c.

Renewals of leases, purchases of the reversion or equity of redemption, &c., by trustees, guardians, or persons regarded by Courts of Equity as standing for this purpose in a fiduciary situation, are also said to involve a constructive trust for the benefit of those who were interested in the lease which was surrendered. See *Holt* v. *Holt*, 1 Ch. Ca. 190; *Rushworth's case*, Freem. 13; *James* v. *Dean*, 11 Ves. 383; 15 Ves. 236; *Wenslow* v. *Tighe*, 2 Ball & B. 195; *Randall* v. *Russell*, 3 Mer. 197; *Giddings* v. *Giddings*, 3 Russ. 241; *Acherley* v. *Acherley*, 7 Br. P. C. 273; *Fosbrooke* v. *Bulguy*, 1 Myl. & K. 226; *Nesbit* v. *Tredennick*, 1 Ball & B. 47; and *infra*, tit. Leases. But, as the more accurate way of viewing these cases is to regard the contingent benefit of renewal as being itself *ab initio* subject to the trust, it seems that they do not fall within the scope of the present inquiry. See observations of Lord *Hardwicke* in *Lloyd* v. *Spillett*, 2 Atk. 150.

Equity of redemption is an implied trust.

An equity of redemption is a trust raised by implication from the nature of the transaction, and comes within the exception in the 8th section. And the nature of the transaction may, for the purpose of raising a trust of this kind, be explained by parol evidence. It is to be observed, that in all the cases the evidence was admitted on the ground of fraud. The trust, however, is clearly in its origin out of the operation of the 7th section, and therefore comes within the rule that allows parol evidence to be used in order to rebut implied trusts. Thus, in *Bonham* v. *Newcomb*, 2 Ch. Cas. 58; *S. C.*, 2 Vent. 365, it was inferred, from the relationship of the parties, that a transaction which, under other circumstances, would have been treated in equity as an ordinary mortgage, was intended for a settlement; and the Court refused to allow of a redemp-

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tion after the period limited by the deed. But, in general, equity is so far from admitting of presumptions against the right of redeeming, that it will not allow any effect to the most stringent covenants, by which it may be attempted to fetter that right: *infra*, tit. MORTGAGES.

Implied trusts may be rebutted by parol evidence.

It has been seen, that circumstances upon which an implication of trust would arise may be established by parol evidence; and it is equally well settled, that other circumstances tending to contradict such implication may also be supplied by evidence of the same kind: in other words, that implied trusts may be rebutted by parol; and implied trusts only. For if the trust which would have been implied without any declaration, is expressly or constructively declared upon the instrument itself, parol evidence to rebut the trust could not be admitted without contradicting the instrument.

Express trusts cannot be rebutted by parol.

What evidence sufficient to rebut an implication of a trust.

In *Maddison* v. *Andrew*, 1 Ves. sen. 59, the evidence of a single witness, being unimpeached, was allowed to rebut the trust implied from the payment of the fine for renewing a lease. See further as to rebutting a resulting trust, *Goodright* d. *Langfield* v. *Hodges*, Lofft, 230; Watk. 227; *Kidder* v. *Kidder*, 10 Ves. 360; *King* v. *Denison*, 1 Ves. & B. 260; *Cook* v. *Hutchinson*, 1 Keen, 42. A resulting trust may be rebutted as to part of the land comprised in a deed, and prevail as to the remainder; and so it may be rebutted as to part of the interest in land: *Benbow* v. *Townsend*, 1 My. & K. 506. See *Maddison* v. *Andrew*, *ubi supra*.

Resulting trust may be rebutted in part.

Purchase in the name of a child or wife.

Of the circumstances that are sufficient to rebut the presumption upon which a trust results to him who advances the purchase-money, a well-known instance is where the money is paid by the parent of the nominee, or by one who stands in the place of a parent to him (*b*), as a grandfather, the father

(*b*) In the *Lex Prætoria*, 272, it is said, that the presumption is less strong in favour of a daughter, because daughters are not usually provided for by settlement of land. It has, however, been decided in favour both of a wife and of a daughter, against creditors and purchasers: *Jennings* v. *Sellick*, 1 Vern. 467;

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being dead (*c*), and the child is insufficiently provided for at the time. In such case the trust does not result; and it is immaterial that the child is illegitimate, or that the estate is reversionary, or, where it is in possession, that the father has the possession, receives the rents and profits, makes repairs and improvements, leases at rack-rent, &c.: *Grey* v. *Grey*, 1 Ch. Cas. 296; 2 Swanst. 598; *Shales* v. *Shales*, 2 Freem. 252; *Mumma* v. *Mumma*, 2 Vern. 190; *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; *Taylor* v. *Taylor*, 1 Atk. 386; 3 Br. C. C. 229; *Elliot* v. *Elliot*, 2 Ch. Cas. 231; *Ebrand* v. *Dancer*, 2 Ch. Cas. 26; (see 1 P. Wms. 608); *Beckford* v. *Beckford*, Lofft, 490; *Finch* v. *Finch*, 15 Ves. 43; *Kilpin* v. *Kilpin*, 1 Myl. & K. 517; *Hepworth* v. *Hepworth*, L. R., 11 Eq. 10; see also *Currant* v. *Jago*, 1 Coll. 261, which was the case of a wife's nephew. If the purchase-money is not paid during the father's lifetime, his personal representative must pay it and the son still keeps the estate: *Redington* v. *Redington*, 3 Ridgw. P. C. 106. In applying the assets, the son would probably be considered to stand in the situation of a devisee, so that the lien for the purchase-money would be enforceable against him for the benefit of the creditors, but not of the legatees, in analogy with the distinction established by the cases of *Selby* v. *Selby*, 4 Russ. 336, and *Wythe* v. *Henniker*, 2 Myl. & K. 635. Where the money is paid in the father's lifetime, the son's claim is good against purchasers and creditors: *Anon.*, 2 Freem. 123; *Lady Gorge's case*, Cro. Car. 550; cit. 2 Swanst. 600; *Jennings* v. *Selleck*, 1 Vern. 467; *Back* v. *Andrews*, 2 Vern. 120; 2 Cox, 97. But where the father was an accountant to the Crown, and had kept possession during his life and after his son had come of age, it was con-

Contract enforceable against the father's personal representatives.

Child's title against purchasers and creditors.

Fraud.

Back v. *Andrews*, 2 Vern. 120. See *Lady George's case*, cit. Cro. Car. 550.

(*c*) The fact that the purchaser stands in *loco parentis* to the nominee must of course be established by parol. And the fact that he has behaved as if he considered himself to stand in that situation, would, it is conceived, if proved, be sufficient to rebut the resulting trust, although the father of the nominee were living: *Powys* v. *Lord Mansfield*, 3 Myl. & Cr. 359.

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sidered, upon a *diem clausit extremum* to be fraudulent against the Crown: *Att.-Gen.* v. *Bagg*, Hard. 125. See *Birch* v. *Blagrave*, Ambl. 264. Notwithstanding a decision to the contrary of *Stuart*, V.-C., in *Sayre* v. *Hughes*, L. R., 5 Eq. 376, it appears to be settled law that the presumption of advancement does not arise as between a *mother* and child: *Holt* v. *Frederick*, 2 P. Wms. 357; *Re De Visme*, 2 De G., J. & S. 17; *Bennet* v. *Bennet*, 10 Ch. D. 474.

Purchase by husband in wife's name.

The presumption of a resulting trust is equally rebutted in the case of a purchase by a husband in the name of his wife, or in the joint names of himself, his wife, and a child or children: *Kingdome* v. *Bridges*, 2 Vern. 67; *Back* v. *Andrew*, Ib. 120; *Lloyd* v. *Pughe*, L. R., 8 Ch. 88. In *Fowkes* v. *Pascoe*, L. R., 10 Ch. 343, a woman purchased stock in the joint names of herself and the son of her daughter-in-law: it was held that no resulting trust arose, but that there was an absolute gift to him. So, too, where a widow transferred stock acquired as survivor of her husband into the joint names of herself, her daughter, and her daughter's husband: *Batstone* v. *Salter*, Ib. 431. Where a husband transferred stock into the names of himself, his wife, and a stranger, who was one of the trustees of their marriage settlement, it was held that the investment was not an augmentation of the settlement nor part of the husband's estate, but was an advancement for the wife: *Re Eykyn's Trusts*, 6 Ch. D. 115; and see *Re Curteis' Trusts*, L. R., 14 Eq. 217. But where the husband transferred monies to a joint banking account for convenience in the management of his affairs, there was no advancement to the wife: *Marshall* v. *Crutwell*, L. R., 20 Eq. 328. See *Dyer* v. *Dyer*, Watk. Cop. 216; 2 Cox. 94.

Joint purchases.

A purchase in the joint names of a child and a stranger gives the entire beneficial ownership to the former: *Lamplugh* v. *Lamplugh*, 1 P. Wms. 113; *Crabb* v. *Crabb*, 1 Myl. & K. 518. And a purchase in the joint names of the father and son is for the benefit of the son, if he survives: *Scroope* v. *Scroope*, 1 Ch. Cas. 27; 2 Freem. 171; 2 Swanst. 599; *Back* v. *Andrew*, 2 Vern. 120; *Stileman* v. *Ash-*

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down, 2 Atk. 477; 1 Myl. & K. 518. In *Back* v. *Andrews*, 2 Vern. 120, a copyhold was surrendered to the use of the purchaser and his wife and daughter and their heirs; and it was held that a subsequent conditional surrender by the husband by way of mortgage was void as to the whole; for the husband and wife took one moiety by entireties, so that the husband could not dispose of it to bind his wife; and the other moiety was well vested in the daughter. See Co. Litt. 187. But, in *Stileman* v. *Ashdown*, 2 Atk. 477, Lord *Hardwicke* said, that the presumption in favour of the son was not so strong in the case of a joint purchase as in others; see, too, *Pole* v. *Pole*, 1 Ves. sen. 76; and held that the surviving son could not claim any part against a judgment creditor. But he laid some stress on the fact, that all the assets had been exhausted in the purchase. See *Christ's Hospital* v. *Budgin*, 2 Vern. 683; *Kingdone* v. *Bridges*, Ib. 67; 2 Cox, 97; but, as to the former case, see *Fletcher* v. *Sedley*, 2 Vern. 490; 1 Ves. sen. 130; 8 Ves. jun. 199; and see *Campion* v. *Cotton*, 17 Ves. 603. Of course, if the son's claim in *Stileman* v. *Ashdown*, had succeeded at all, it would have succeeded as to the entirety.

Purchase of copyholds for lives *successivè*.

Where it was the custom of a manor to grant copyholds for lives in succession, and that the first taker might surrender the whole lease, it was once held, that where a father took the grant to himself, his son, and daughter *successivè*, the trust resulted to the father: *Dickinson* v. *Shaw*, 2 Cox, 95, cit. But the contrary has since been decided, and that the custom that the first nominee may surrender the whole lease is immaterial: *Dyer* v. *Dyer*, 2 Cox, 92, 96; Watk. Cop. 216; *Swift* d. *Farr* v. *Davis*, 8 East, 354, n.; *Finch* v. *Finch*, 15 Ves. 50; *Lewis* v. *Lane*, 2 Myl. & K. 454. See also *Jeans* v. *Cooke*, 24 Beav. 513.

Implication in favour of child or wife may be rebutted by evidence.

The rule in favour of children which has just been considered, is founded merely on the presumption of intention gathered from the relationship of the parties, and may be rebutted by evidence of a different intention, either direct or implied from circumstances. See the judgment of *Eyre*, C. B., *Dyer*

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v. *Dyer*, 2 Cox, 93; see *Taylor* v. *Alston*, cit. 2 Cox, 96. So also in *Marshal* v. *Crutwell*, L. R., 20 Eq. 328, where a husband in failing health transferred his amount at his bankers into the joint names of himself and his wife, directing that his cheques should be honoured, it was held upon the evidence that the circumstances showed that this was merely an arrangement for convenience, and was not intended to be a provision for the wife.

What evidence sufficient to raise a trust for the father.

Upon the question of what evidence will be sufficient to show that an advancement was not intended, it may be observed, in the first place, that the circumstances relied on must be contemporaneous: no subsequent declaration, conveyance, devise, or other act, by the parent, will do: *Elliot* v. *Elliot*, 2 Ch. Cas. 231; *Mumma* v. *Mumma*, 2 Vern. 19; *Sidmouth* v. *Sidmouth*, 2 Beav. 447. See also *Stock* v. *M'Avoy*, L. R., 15 Eq. 55, where it was held that the admissible evidence showed such unmistakeable taking of possession by a father as to rebut the presumption of advancement. So, if the father makes a will, devising away the estate, if he has made no declaration at the time of the purchase, the will cannot be looked to as evidence of what he meant by the purchase, still less as controlling what he did in fact intend to do at that time: Ib.; *Crabb* v. *Crabb*, 1 My. & K. 511. So, where the father *subsequently* obtained a licence to demise the estate, being copyhold: *Murless* v. *Franklin*, 1 Swanst. 13. If the licence had been taken at the same time, it would have been otherwise: *Swift* d. *Farr* v. *Davis*, 8 East, 354, n.; and where the father had a copyhold estate in possession for his life, with remainder to his two daughters in succession; and the custom was, that the grantee in possession might by surrender pass his own estate and those in remainder, and he procured a grant to his son in remainder, and *at the same Court* surrendered all his estate and interest during the lives of himself, his daughters, and his son, to the use of his will, it was held, that this showed he meant it to remain at his own disposal, and that his son should be trustee only: *Prankerd* v. *Prankerd*, 1 Sim. & St. 1.

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Where the son had been put into possession, and, falling ill, made a declaration of trust in favour of the father, and after his recovery continued in possession and married, it was held fraudulent against his wife and creditors: *Bateman* v. *Bateman*, 2 Vern. 436.

Fraud.

Purchase in name of child already advanced.

If the son is already provided for, the presumption in his favour does not arise, the obligation upon which it is founded being discharged, and the trust results in the same manner as if the son were a stranger: *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Pole* v. *Pole*, 1 Ves. sen. 76. But a reversionary estate is not a provision for this purpose, *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; and a partial provision is not sufficient to raise the trust: 2 Swanst. 600. The father is the only judge as to the quantum of a son's provision, and though he may seem to have been sufficiently advanced before, yet if it appear that the father thought otherwise, it will be inferred that he intended completely to discharge his duty, and no trust will result: *Redington* v. *Redington*, 3 Ridgw. P. C. 106; 2 Cox, 94.

Purchase in child's name made for a particular purpose.

If it be presumable from circumstances, that some other object than advancement was intended, *e.g.*, to serve a joint tenancy, a trust will arise: *Baylis* v. *Newton*, 2 Vern. 28. See also *Birch* v. *Blagrave*, Amb. 265, and *Lloyd* v. *Spillett*, 2 Atk. 150, where the distinction is clearly laid down by Lord *Hardwicke*.

Parol explanation of writings.

VI.—Parol Evidence to explain or control written Instruments.

Parol Explanation of written Instruments.]—The use of parol evidence in aid of the construction of writings is regulated by principles which are quite independent of the Statute of Frauds, having been established long before that statute was passed. Although, as has been already observed (*ante*, p. 325), the common law for some purposes recognized two kinds of contracts only; that is to say, contracts by speciality and parol contracts, which latter class included all unsealed writings; see

Rann v. *Hughes*, 7 T. R. 350, n., *ante*, p. 326; Bac. Ab. *Ev.* (G.); yet, for the purposes of construction, a distinction was taken between words written and words spoken, upon which was founded the rule, that extrinsic evidence shall not be admitted to vary or correct the purport of a writing: *Meres* v. *Ansell*, 3 Wils. 275; *Butcher* v. *Butcher*, 1 Bos. & P. N. R. 113; *Clowes* v. *Higginson*, 1 Ves. & B. 526; *Woodbridge* v. *Spooner*, 3 B. & Al. 233; *Adams* v. *Wordley*, 1 Mee. & W. 374. *Quoties in verbis nulla est ambiguitos, ibi nulla expositio contra verba fienda est:* Co. Lit. 147a. There are some apparent exceptions which serve to illustrate the rule, and one real exception, namely, the admission of such evidence in cases of fraud, which shows the policy upon which it proceeds. Another exception, which is more anomalous, and the limits of which are not so well defined, is the admission of parol evidence of intention to explain latent ambiguities.

Parol Explanation of Writings.

"It would be inconvenient," says Lord *Coke*, speaking of the rule, that every contract or agreement ought to be discharged by matter of as high a nature as the first deed, "that matters in writing, made by advice, and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matters in writing should be admitted: *Countess of Rutland's case*, 5 Rep. 26. See *Parteriche* v. *Powlet*, 2 Atk. 383. So, in the case of *Goss* v. *Lord Nugent*, 2 Nev. & M. 33, Lord *Denman*, C. J., laid it down, that "by the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract. But after the agreement has been reduced into writing, it is competent to the parties at any time

Written agreements, &c., not to be varied by parol.

Goss v. *Lord Nugent.*

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before breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be left of the written agreement." The latter branch of the proposition just cited assumes that the subject-matter of the agreement is not such as is required by any Act of Parliament to be expressed in writing, and will be considered presently. See also *Williams* v. *Jones*, 5 B. & Cr. 108; *Evans* v. *Roe*, L. R., 7 C. P. 138.

In the recent case of *Inglis* v. *Buttery*, 3 App. Cas. 552, it was held that where a contract had been embodied in a written agreement, evidence of previous negotiations was not admissible for the purpose of interpreting the intention of the parties, nor could deleted words in the agreement itself be adduced for that purpose.

Declarations at auctions.

Parol evidence of declarations by an auctioneer at a sale, varying or adding to the printed particulars, will not be admitted at law on behalf either of a plaintiff or defendant, nor in equity, at any rate on behalf of a plaintiff. Thus, when the conditions of sale of the timber growing in a certain close were silent as to the quantity, evidence offered by the purchaser, in defence to an action for part of the purchase-money, that the auctioneer had warranted the timber to amount to a certain quantity, was rejected: *Powell* v. *Edmunds*, 12 East, 6. See *Jones* v. *Edney*, 3 Camp. 285; *Jenkinson* v. *Pepys*, 6 Ves. 330; 15 Id. 521. So in *Gunnis* v. *Erhart*, 1 H. Bl. 289, where the conditions of sale stated the estate to be free from all incumbrances, and it turned out that there was a charge of 17*l.* per annum upon them, the sellers, as plaintiffs, were not allowed to give in evidence that the auctioneer had publicly declared at the sale that the estate was so charged. In *Bradshaw* v. *Bennett*, 5 C. & P. 48, the particulars of sale stated that the property was held for three lives, but before the sale one of the lives had fallen in; but

As to particular notice of an incumbrance, &c.

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evidence that the auctioneer had stated that fact was rejected. See *Anson* v. *Towgood*, 1 Jac. & W. 637. In *Shelton* v. *Livius*, 2 Cr. & J. 411, where A., the purchaser at an auction, had sold his lot to B. immediately after it was knocked down to him, evidence of declarations by the auctioneer, varying the terms of the particulars, which were heard by B. as well as by A., was not admitted in an action by A. against B.

Written agreement that purchaser shall abide by *declarations* made at the sale.

A written agreement that the purchaser shall "abide by the conditions and declarations made at the sale," does not authorize the vendor as *plaintiff* to use such declarations in evidence against the purchaser: *Higginson* v. *Clowes*, 15 Ves. 516; affirmed, 1 V. & B. 424.

Parol evidence of matters not within the scope of the instrument.

The existence of a writing does not, however, necessarily exclude parol evidence as to every part of the transaction to which it relates; for, if the writing does not on the face of it purport to include the whole transaction, there is no objection at common law to the proof by averment of those matters which are not within its scope. In *Davis* v. *Symonds*, 1 Cox, at p. 405, *Eyre*, C. B., speaking of the rule that excludes parol evidence when there is a writing, said: "I take this rule to apply in every case when the question is, *what* is the agreement? And this rule applies no further than this precise question; for as often as the question is, what were the collateral circumstances attending the agreement? so often may such collateral circumstances be proved by parol evidence: there is no law which says such collateral circumstances may not be so proved. If any of these collateral circumstances are reduced into writing, then the same rule applies to them as to the original agreement; but if not, both at law and in equity, such collateral circumstances may be proved by parol." Thus, although the consideration upon which an agreement is made is an essential part of that agreement, while it is executory (*ante*, p. 326), yet it is not necessary to be stated in a conveyance by which an agreement is executed, for the conveyance is not in the nature of an agreement so

Davis v. *Symonds*.

Parol evidence of consideration.

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much as it is a performance on one side (*a*); if therefore in a deed of conveyance no consideration is stated, parol evidence may be received to show that there was a consideration: *Peacock* v. *Monk*, 1 Ves. sen. 128. So also if a nominal consideration is named in the deed, evidence *aliunde* may be given of the real consideration: *Re Leifschild*, L. R., 1 Eq. 231. "It may be shown by extrinsic evidence who is the author of a gift, when that does not appear upon the face of the transaction. Whatever is wanting to show the consideration, and from whom it moves, may, I apprehend, be supplied by evidence *dehors* the deed, when such evidence does not contradict the deed:" Per Sir *W. Grant*, M. R., *Hartopp* v. *Hartopp*, 17 Ves. 192. See 14 Ves. 170. So if the conveyance is expressed to be made "for divers good considerations," upon which general words it is settled no use arises, a particular consideration as that of relationship, or money paid, may be proved by averment: *Mildmay's case*, 1 Rep. 175. See *Lacy* v. *Whetston*, Cr. El. 343, *contra*.

As to proving a *different* consideration from that stated.

Parol evidence to show consideration.

In *Lord Cromwell's case*, 2 Rep. 69, it was resolved, "that when a fine, feoffment or other conveyance imports an express consideration, a man may aver by word another consideration which stands with the consideration expressed; but the parties cannot by parol aver any other use than is contained in the same conveyance; also, no averment shall be *against* the consideration expressed." See also *Bedell's case*, 7 Rep. 39. In *Villers* v. *Beaumont*, Dy. 146, pl. 68; 1 Rep. 176; 4 Rep. 3; an indenture of bargain and sale was expressed to be made in consideration of 70*l.*, paid by C., and a recovery was suffered thereon; and an averment that the indenture was made, and the recovery had, in consideration of a marriage between R. B. and C. (in order to make it

(*a*) And so the date is not of the substance of a deed, for as the writing and sealing precede the delivery, a false or impossible date does not exclude proof of the actual time of delivery: *Goddard's case*, 2 Rep. 4; *Hall* v. *Cazenove*, 4 East, 477. See *Styles* v. *Wardle*, 4 B. & C. 908; *Davis* v. *Jones*, 17 C. B. 625.

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a jointure within the stat. 11 Hen. 7), was allowed, although there was a particular consideration mentioned in the deed. *A fortiori*, it was allowable where there was no certain consideration named. See also *Vernon's case*, 4 Rep. 3 (*a*). In *Rex* v. *Scammonden*, 3 T. R. 474, to establish a settlement, it was allowed to be shown by parol, that before the deed of conveyance of an estate, which recited the consideration for the purchase to be 28*l.*, was executed, the vendor refused to execute unless he had 30*l.*, which was paid, and the deed executed without alteration. The evidence in *Rex* v. *Scammonden* was not admitted for the purpose of altering the construction of the instrument as between the

Evidence to vary agreements, as against third persons.

(*a*) Of course, in order to show that a transaction was void for illegality, &c., the party impeaching it may prove the want of a consideration in opposition to the express statement in the deed, or may prove a different consideration from that stated: *Doe* d. *Chandler* v. *Ford*, 5 Nev. & M. 209; *Rex* v. *Olney*, 1 Mau. & S. 387; *Rex* v. *Cheadle*, 3 B. & Ad. 833. But a different consideration from that stated in the deed cannot be alleged, it seems, by the party charged with a fraud, in order to support the transaction, unless the truth of the statement is itself impeached on the other side. See *Clarkson* v. *Hanway*, 2 P. Wms. 203. And as no executory compact is binding, unless made for good consideration, or under seal, a statement of a consideration in an instrument not under seal, may be disproved by the party to whom the consideration is falsely stated to have moved. See *Pike* v. *Street*, 1 Mood. & M. 226; *Foster* v. *Jolly*, 1 Cr., M. & R. 703; *Rex* v. *Wrangle*, 4 Nev. & M. 375. The distinction is between evidence of agreement and evidence of a fact. Where the parties have agreed to state the terms of their contract in writing, they are bound to rely on the writing as conclusive evidence of those terms; but where they state a fact in writing (not expressly agreeing to be bound by such statement), the writing, though evidence *pro tanto* of the fact, does not exclude other evidence: and to contradict it by such evidence is not to vary any term of the agreement, but to show that it was made under different circumstances from those stated. Thus, a receipt for money is a memorandum of a fact, and may be contradicted; a written release, if it is not stated to be founded on a payment which in fact has not been made, is evidence of an agreement, and cannot be contradicted; though, of course, its binding effect may be questioned. Where a person, by writing, agrees to give up his legal rights, the paper does not exclude evidence that he was ignorant of their true nature, for that is a fact, and not part of the agreement: *M'Carthy* v. *Decaix*, 2 Russ. & M. 614; *Pickering* v. *Pickering*, 2 Beav. 31; affirmed on appeal, 4 My. & Cr. 289.

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parties to it, but for the purpose of showing, as between one of those parties and third persons, what were the real circumstances attending the transaction. See *Rex* v. *Wickham*, 4 Nev. & M. 406, where strangers to a deed were allowed to show that land described in it as being in the parish of C., was really situate in A. And generally any verbal representations may be given in evidence for the purpose of establishing any fact or understanding which does not properly fall within the scope of the written agreement: *Williams* v. *Jones*, 5 B. & Cr. 108; *Hope* v. *West*, 7 Scott, 876.

Evidence of collateral circumstances.

Parol evidence as to agreement between two persons, parties on the same side, to a written instrument.

So, an agreement may be complete, as between the two opposite contracting parties to the instrument, without stating the terms of the arrangement between several persons on the one side. Thus, where A. as principal, and B. as surety, entered into a joint and several bond to N. for 1,200*l.*, and C. by another bond, reciting the former bond, bound himself for the same sum, with condition to be void on payment by A. and B., or either of them. The transaction, so far as concerned the security to N., was completely expressed on the face of the instruments, and the arrangement between A., B., and C., as to the order in which they should be liable among themselves, being immaterial for the purpose of the security to N., was allowed to be made out by parol. "Evidence is admitted," said Lord *Eldon*, "to show who is the principal and who the surety, and in order to determine that, to show to whom the money was advanced; and why is it not to be admitted to show to whom the money was advanced as between C. and the others?" *Craythorne* v. *Swinburne*, 14 Ves. 170. See *Davis* v. *Symonds*, 1 Cox, 402, 404.

Evidence to show the object of a security.

So, the object for which a bond or other security is given, being a collateral circumstance to the legal effect of the instrument, and in the nature of a trust of personalty (which is not within the Statute of Frauds), may be proved by parol: *Ward* v. *Lant*, Pr. Ch. 182; *Johnson* v. *Smith*, 1 Ves. sen. 314; *Stratford* v. *Powell*, 1 Ball & B. 1. See *Simpson* v. *Vaughan*, 2 Atk. 31; *Burn* v. *Burn*, 3 Ves.

573; *Ex parte Morley*, 2 Dea. & Ch. 50. As to the jurisdiction of the Court over its judgments in cases of mistake, fraud, &c., see *Antrobus* v. *Smith*, 12 Ves. 39. So, the remedy may be extended beyond the penalty: *Grant* v. *Grant*, 3 Russ. 598; *Clarke* v. *Lord Abingdon*, 17 Ves. 106. See *Clarke* v. *Seaton*, 6 Ves. 411.

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But, where a creditor compromises by writing with the principal debtor, and intends to preserve his remedy against the surety, a stipulation to that effect is so far an essential part of the transaction, that it must be inserted in the writing, and cannot be proved by parol: *Ex parte Glendining*, *Re Renton*, Buck. 517.

Parol evidence where writing does not purport to include the whole transaction.

Again, if the writing on the face of it does not purport to state all the terms of a complete agreement, although no evidence will be allowed to alter that which it does determine, those terms as to which it is silent may be established by parol. Thus, in *Jeffry* v. *Walton*, 1 Stark. 267, the defendant had hired a horse of the plaintiff, and the following memorandum was made at the time:—"Six weeks at two guineas. W. Walton, jun.:" and parol evidence that the defendant agreed to be answerable for accidents was admitted.

Where, by the same instrument, A. agreed to purchase an estate of B., and B. agreed to purchase another estate of A., and A. failed to make a title to the estate which he was to sell to B., it was held, in a suit by B. for specific performance of the contract on A.'s part, that A. could not read parol evidence to prove that the two sales were intended to be conditional: to do so would be to vary the agreement: *Croome* v. *Lediard*, 2 My. & K. 251.

Parol evidence to prove fraud.

As circumstances which constitute fraud against one of the parties to an agreement cannot be said to form any part of the agreement, the admission, of parol evidence of fraud, for the purpose of impeaching a written instrument, 1 Dick. 347, seems to form no exception to the rule under consideration; even where the effect of such evidence is to prove a different contract from that which is evidenced by the writing, for the evidence is offered, not for the

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purpose of setting up a different agreement, but to prove fraud, or a mistake, the taking advantage of which would be fraudulent, 1 Cox, 404; and for this purpose, it is indifferent whether the party impeaching the instrument for fraud is plaintiff or defendant; it is enough if he can show that he will be defrauded if the relief he asks is refused. There is, however, in most cases, an obvious distinction between the situation of the plaintiff and the defendant; the former, if he is prevented from enforcing terms agreed upon by parol, is merely left as if no agreement had ever been made, and loses nothing but the benefit of the agreement which he might have secured by due precaution; but the defendant, if he is not allowed to vary the written evidence by parol, may be obliged to perform that which he never agreed to do, or to do a thing without receiving the stipulated advantage, which would be too hard a penalty for a mere want of precaution. This would be a kind of fraud, and for this reason, as well as on the ground that the giving specific performance at all is discretionary, courts of equity have been in the habit of allowing the defendant to show, by parol evidence, that the agreement sought to be enforced is not the true one, although a plaintiff will not generally be allowed to enforce performance of any thing which is not reduced to writing.

Plaintiff may use parol evidence to show fraud.

Defendant may give parol evidence to vary a writing when plaintiff may not.

Distinction between executory and executed agreements, in respect of the admission of parol evidence.

Att.-Gen. v. *Sitwell.*

In the case of *The Att.-Gen.* v. *Sitwell*, 1 Y. & C. Ex. 559, where the question was, whether a contract for the sale of a manor belonging to the Crown, "with the appurtenances," should be executed with those words, which in a conveyance between subject and subject would have carried an advowson appurtenant to the manor; and it appeared, that neither party contemplated the advowson, which was of greater value than the manor; *Alderson*, B., said at p. 583, as to the question, whether or not, on the ground of mistake, he could have reformed the agreement, and have directed the specific performance of it when so reformed: "I confess I should have had great difficulty in holding that this could be done; because I cannot help feeling, that in the case of an executory agreement, first, to reform, and then to decree an

execution of it, would be virtually to repeal the Statute of Frauds" (*c*). See *Woollam* v. *Hearn*, 7 Ves. 219; *Townshend* v. *Standgroom*, 6 Ves. 328; *infra*, p. 354.

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On the other hand, in *Clarke* v. *Grant*, 14 Ves. 524, Sir *W. Grant*, M. R., said: "It would be against equity, and a fraud on the defendant, to insist on his performance of an agreement which he only signed on the faith of an alteration being made in one of its terms. It has been ruled that it is not open to a plaintiff to supply or correct a term of a written agreement by parol: *Rich* v. *Jackson*, 4 Br. C. C. 514; *Marquis of Townshend* v. *Standgroom*, 6 Ves. 328; but it has never been determined that a defendant cannot set up a parol engagement in opposition to a party, who, having entered into it, seeks to have a written agreement specifically performed independently of it. The Statute of Frauds has not altered the situation of a defendant against whom a specific performance is prayed. A defendant in such a case may give the same evidence now which he might have given before." And on this ground his honor refused to decree performance of a written agreement, except according to a parol promise to vary it, which was proved to have been made at the time of signing. See *Clowes* v. *Higginson*, 1 Ves. & B. 524 (*d*); *Pym* v. *Blackburn*, 3 Ves. 34; *Gordon* v. *Hertford*, 2 Mad. 106; *Barfield* v. *Kelly*, 4 Russ. 355; *Van* v. *Corpe*, 3 My. & K. 269.

Parol evidence by way of defence.

What circumstances are sufficient to raise a case of fraud or mistake in favour of the defendant, is a question of difficult determination. In *Croome* v. *Lediard*, 2 My. & K. 251, by a single agreement, A. agreed to purchase an estate of B., and B. agreed to purchase another estate of A., who was a solicitor, and had prepared the agreement; and A., being

Croome v. *Lediard.*

(*c*) An agreement is executory which has not been executed on either side, and marriage articles cease to be executory after the marriage has taken place, and are subject to reformation as much as formal settlements: *Duke of Bedford* v. *Marquis of Abercorn*, 1 My. & Cr. 312.

(*d*) See the remarks of Lord *St. Leonards* on the judgment of Sir *T. Plumer* in this case, Sugd. Vend. 161, 162.

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unable to make a good title to the estate purchased by B., offered in defence to a suit for specific performance of his agreement to purchase B.'s estate, parol evidence to prove that the two purchases were intended to be mutual and conditional, on the footing of an exchange; but the evidence was rejected by Sir *J. Leach*, M. R., and by Lord *Brougham* on appeal.

Ramsbottom v. *Gosden*.

Parol evidence of *mistake*.

In *Ramsbottom* v. *Gosden*, 1 Ves. & B. 165, evidence was admitted that the solicitor who prepared the agreement for a purchase, omitted by mistake to provide that the purchaser should bear the expense of making out the title, and on that ground refused to enforce performance against the vendor, except according to the parol agreement. In *Winch* v. *Winchester*, 1 Ves. & B. 375, the particulars of sale described the estate as containing, by *estimation*, forty-one acres, *more or less*. The quantity was under *thirty-six* acres, and evidence that the auctioneer had declared at the sale that it was sold for forty-one acres, and if it proved to be less, an abatement should be made, was admitted in defence to a bill for specific performance without an abatement of price. In *The Marquis of Townshend* v. *Standgroom*, 6 Ves. 328, Lord *Eldon*, C., refused to admit parol evidence of surprise in favour of a plaintiff seeking to enforce a contract as varied by such evidence, but admitted the same evidence used by the same plaintiff as a defence in another cause in which he was defendant. His lordship, after reviewing the authorities, observed: "I will not say there are not cases in which evidence may be received to rectify a written agreement upon surprise and mistake, as well as fraud; proper irrefragable evidence, as clearly satisfactory that there has been mistake and surprise, as in the other case that there has been fraud. I agree, those producing evidence of mistake, or surprise, either to rectify an agreement, or calling upon the Court to refuse a specific performance, undertake a case of great difficulty; but it does not follow, that it is therefore incompetent to prove the actual existence of it by evidence." In the case before him, however, his lordship, though he thought

Winch v. *Winchester*.

Misrepresentation.

Marquis Townshend v. *Standgroom*.

Evidence to *reform* an agreement.

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the evidence did not justify him in rectifying the written agreement, held it sufficient to induce him to refuse to enforce it as it stood. In *Garrard* v. *Grinling*, 2 Swanst. 244, specific performance of a written contract for a lease was refused, it appearing by parol that one term of the agreement (namely, the insertion of an unusual covenant), was omitted. See also *Twining* v. *Morrice*, 2 Br. C. C. 326.

Garrard v. *Grinling.*

In *Calverley* v. *Williams*, 1 Ves. jun. 210, it was held, upon a bill and cross bill, that a purchaser was not entitled to a conveyance of certain acres of land, which came within the general description in the advertisement of sale, as it was not proved to have been in the contemplation of either party, nor contained in a more particular description, to which the purchaser was referred. Lord *Thurlow*, C., said, that, no doubt, if one party thought he had purchased *bonâ fide*, and the other thought he had not sold, that would be a ground for setting aside the contract, that neither party might be damaged.

Calverley v. *Williams.*

In *Joynes* v. *Statham*, 3 Atk. 388, a bill was filed for specific performance of an agreement for a lease. The defendant alleged that there was a mistake in the agreement with respect to the rent; that the rent was to be clear of taxes, which was not mentioned in the writing, and he offered parol evidence to prove that that was part of the agreement, which evidence was admitted by Lord *Hardwicke*, on the ground that the Court would never enforce specific performance where there was an omission by mistake or fraud, which could only be proved by parol. Lord *Hardwicke's* suggestion, that, had the defendant been the plaintiff, he might have been allowed to insist on the matter which he then used in his defence, seems to be expressed too largely. See *Preston* v. *Merceau*, 2 W. Bl. 1249; 7 Ves. 219; 3 Br. C. C. 388; and *Clinan* v. *Cooke*, 1 Sch. & Lef. 38, where Lord *Redesdale* observed, that he could find no decision except the contrary way, and added, "The admission of such evidence as matter of defence is frequent: *Legal* v. *Miller*, 2 Ves. sen. 299. And the same doctrine is stated in *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 375; and in an older case, 1 Vern.

Joynes v. *Statham.*

Parol evidence by way of *defence.*

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240. It is used to rebut an equity. The defendant says, 'The agreement you seek is not the agreement I meant to enter into,' and then he is let in to prove fraud or mistake. . . . Such a case is left as it was by the statute: it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind." See *Rann* v. *Hughes*, 7 T. R. 350, n.

Purchase by mistake.

Where the defendant coming into an auction room in a hurry by mistake bid for a lot which was not the lot which he intended to buy, and did not explain his mistake to the auctioneer until the conclusion of the sale, the Court refused to enforce performance against him, observing that by so doing it did not relieve him from any legal responsibility which he might have incurred, and that he would still be answerable for any loss which his conduct might have occasioned to the vendor: *Malins* v. *Freeman*, 2 Keen, 25.

Terms designedly omitted from the writing.

But a defendant cannot insist on a parol term agreed upon at the time of making the written agreement, and which was never intended to be put into writing, and therefore was not omitted by mistake or fraud. *Jackson* v. *Cator*, 5 Ves. 688, where a provision was omitted by mutual agreement for the sake of making the lease uniform with others. See *Lord Irnham* v. *Child*, 1 Br. C. C. 92, *infra*, p. 357.

In what cases a plaintiff may read parol evidence to vary written agreement.

Pember v. *Mathers*.

In *Pember* v. *Mathers*, 1 Br. C. C. 52, a bill was brought by lessees against their assignee for specific performance of his parol undertaking, to indemnify the plaintiffs against the rents and covenants, and to execute a bond for such indemnity. The purchase had been made at an auction, and the conditions of sale did not stipulate the indemnity, but it rested on parol evidence. Lord *Thurlow* held this evidence to be admissible, on the ground that where the objection is taken before the party executes the agreement, and the other party promises to rectify it, it is to be considered as a fraud, if such promise is not kept; and it being found, upon an issue, that the promise was made on the day of the execution of the assignment, a specific performance was

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decreed. See *Beaumont* v. *Bramley*, Turn. & R. 41, and the remarks of Sir *W. Grant*, M. R., on *Pember* v. *Mathers*, in 14 Ves. 524. *Rich* v. *Jackson*, 4 Br. C. C. 514; 6 Ves. 334, n., does not seem to be consistent with this decision; for there, though a formal lease had not been executed, the plaintiff in equity appears to have been bound at law by the terms of the written agreement. See also *Fell* v. *Chamberlaine*, 2 Dick. 484, where the parol evidence was contradicted by the oath of the opposite party; and see 1 Eq. Abr. 230; *Baker* v. *Paine*, 1 Ves. sen. 456; *Langley* v. *Brown*, 2 Atk. 195, 203; *Jordan* v. *Sawkins*, 3 Br. C. C. 388; *Uvedale* v. *Halfpenny*, 2 P. Wms. 151; *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 375; *Barston* v. *Kilvington*, 5 Ves. 593; *Woollam* v. *Hearn*, 7 Ves. 211; *Ramsbottom* v. *Gosden*, 1 Ves. & B. 165; *Croome* v. *Lediard*, 2 My. & K. 251.

What evidence will induce the Court to enforce performance with a variation.

In *Lord Irnham* v. *Child*, 1 Br. C. C. 93, Lord *Thurlow*, C., said: "The rule of evidence is not subverted, if there is clear proof of fraud: the committing the agreement to writing is an argument against fraud. Then, as to mistake or accident, suppose it was a very clear thing that an agreement was intended, and that by accident it was extended further. But there is no such case in the books. If *admitted* to be a mistake, the Court would not overturn the rule of equity by varying the deed, but it would be an equity *dehors* the deed. *Then it should be proved as much to the satisfaction of the Court as if it were admitted.* The difficulty of this is so great, that there is no instance of its prevailing against a party insisting that there was no mistake." See 3 Br. C. C. 169; 6 Ves. 332; *Beaumont* v. *Bramley*, Turn. & R. 41. In *Shelburne* v. *Lord Inchiquin*, 1 Br. C. C. 341, 350, which was a bill for reforming a settlement, the same distinguished judge said: "If two persons entrust to a third person to draw up minutes of their intention, and such person does not draw them according to such intention, that case might be relieved, for that would be a kind of fraud. It must be an essential ingredient to any relief under this head, that it should be an accident perfectly distinct from the sense of the instrument." "To

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be sure it must be strong irrefragable evidence; but I do not think I can reject it as *incompetent*." See *Taylor* v. *Radd*, cit. 5 Ves. 595; *Cock* v. *Richards*, 10 Ves. 437, 441; *Pearce* v. *Verbeke*, 2 Beav. 333. In *Alexander* v. *Crosbie*, Cas. tem. Sugd. 149, Sir *E. Sugden*, C., said: "As to the authority of a court of equity to reform a settlement, nobody can dispute its power to correct a mistake; and it is not material that the settlement was made and the property actually conveyed by it for valuable consideration: for, if any part of the property was included by mistake, the Court may take it out of settlement without compensation. But a court of equity is always tender in varying a settlement where the effect will be to defeat vested rights, or where it is sought to do so on mere parol evidence. In all the cases, perhaps, in which the Court has reformed a settlement, there has been something beyond the parol evidence; such, for instance, as the instructions for preparing the conveyance, or a note by the attorney, and the mistake properly accounted for; but the Court would, I think, act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach."

Reforming agreements, &c.

Henkle v. *Royal Exch. Ass. Co.*

A bill to correct a policy of insurance after the loss had happened, was dismissed by Lord *Hardwicke* for want of proof; but his lordship had no doubt that the Court had jurisdiction to relieve in respect of a plain mistake in writing, as well as against frauds in contracts, though there ought to be the strongest proof possible: *Henkle* v. *Royal Exchange Assurance Company*, 1 Ves. sen. 317. Accordingly, in *Baker* v. *Paine*, 1 Ves. sen. 456; 6 Ves. 336, n., the same learned judge corrected a written mercantile contract which had been acted upon, by reference to the written minutes from which it had been drawn up by an attorney, together with parol evidence of mistake. See, also, in *D'Olliffe* v. *The South Sea Company*, cit. 2 Ves. sen. 376; 5 Ves. 600.

Baker v. *Paine.*

In *Young* v. *Young*, cited 1 Dick. 295, which was a case upon a settlement, the mistake arose from a marginal note in the draft, which was copied in the

engrossment; and the draft being produced, and the mistake explained, it was rectified. See *Rogers* v. *Earl*, 1 Dick. 294; *Thomas* v. *Davis*, Id. 301; *Exeter* v. *Exeter*, 3 Myl. & Cr. 321. Parol Explanation of Writings.

Other cases, on reforming a settlement, either from parol or internal evidence, are—*Seymour* v. *Fotherby*, 1 Vern. 320; *Griffith* v. *Buckle*, 2 Vern. 13; *Uvedale* v. *Halfpenny*, 2 P. Wms. 151; 9 Mod. 56; *West* v. *Erissey*, 2 P. Wms. 349; *Heneage* v. *Hunlocke*, 2 Atk. 456; *Partyn* v. *Roberts*, Amb. 315; *Roberts* v. *Kingsley*, 1 Ves. sen. 238; *Targus* v. *Puget*, 2 Ves. sen. 194; *Worsley* v. *E. Granville*, Id. 333; *Lady Londonderry* v. *Wayne*, Amb. 424; *Doran* v. *Ross*, 1 Ves. jun. 57; *Payne* v. *Collier*, Id. 171; *Randall* v. *Willis*, 5 Ves. 262; *Ainslie* v. *Medlycott*, 9 Ves. 13; *Exeter* v. *Exeter*, 3 My. & Cr. 321; *Pearce* v. *Verbeke*, 2 Beav. 333; *Re De La Touche's Settlement*, L. R., 10 Eq. 599; *Smith* v. *Iliffe*, L. R., 20 Eq. 666; *Re Daniel's Settlement*, 1 Ch. D. 375; *Re Bird's Trusts*, 3 Ch. D. 214; *Clark* v. *Girdwood*, 7 Ch. D. 9; *Hanley* v. *Pearson*, 13 Ch. D. 545; *Lovesy* v. *Smith*, 15 Ch. D. 655; *Welman* v. *Welman*, 15 Ch. D. 570. As to reforming a bond, see *Crosby* v. *Middleton*, Prec. Ch. 309; *Simpson* v. *Vaughan*, 2 Atk. 33; *Bishop* v. *Church*, 2 Ves. sen. 100, 371; *Burn* v. *Burn*, 3 Ves. 573; *Ex parte White*, *Re White*, 2 Mon. & A. 541. As to reforming an entry on the Court rolls, see *Elston* v. *Wood*, 2 My. & K. 678. Correcting bond. Correcting Court rolls.

It is no objection to a bill for relief against a mistake, that the mistake was made by the party himself who asks the relief, and who drew the instrument: *Bishop* v. *Church*, 2 Ves. sen. 100; *Ball* v. *Storie*, 1 Sim. & St. 210.

In order to justify the Court in altering a settlement, a clear intention must be proved: it must be shown that the settlement does not carry into effect the intention of the parties. If there be merely evidence of doubtful or ambiguous words having been used, the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words. It must be proved, too, that there was no change of intention by which the Evidence on which a settlement will be rectified.

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variation between the settlement and the original contract might be explained: *Marquess of Breadalbane* v. *Marquess of Chandos*, 2 My. & Cr. 712. See *Partyn* v. *Roberts*, Amb. 315; *Beaumont* v. *Bramley*, Turn. & R. 41. In *Jenkins* v. *Quinchant*, 5 Ves. 596, n., a settlement was reformed (but not against evidence), upon a letter from the husband containing instructions for drawing it, it not being shown that there were any other instructions; and this, notwithstanding a subsequent recognition of the settlement by adding another estate, as it did not appear that the attention of the parties was drawn to the error. In *Barstow* v. *Kilvington*, 5 Ves. 593, Lord *Loughborough*, C., reformed a settlement against an heir, upon a letter of the settlor written *subsequently* to the execution of the settlement.

Omission by design for a fraudulent purpose, &c.

If the term which it is proposed to insert into the instrument was omitted by mutual agreement, and especially if that was done under the supposition that it would be illegal, although erroneous, or if the suppression was made for the purpose of defrauding the law, or for any unfair purpose, equity will not lend its assistance to insert the parol agreement: *Lord Irnham* v. *Child*, 1 Br. C. C. 92; *Hare* v. *Shearwood*, 3 Br. C. C. 168; 1 Ves. jun. 241. See 6 Ves. 332; *Haynes* v. *Hare*, 1 H. Bl. 659; *Lord Portmore* v. *Morris*, 2 Br. C. C. 219; *Rosemond* v. *Milsington*, 3 Ves. 40, n. See *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 375; 6 Ves. 336; *Brackenbury* v. *Brackenbury*, 2 Jac. & W. 391; *Groves* v. *Groves*, 3 Y. & J. 163.

Evidence admitted to show that transaction was illegal.

If the transaction as it really took place was illegal, or offended against the policy of the law, the same policy allows the written evidence of the agreement to be falsified or varied by parol evidence of the illegal circumstances; and this whether the instrument is sealed or not: *Shaw* v. *Bran*, 1 Stark. 319; *Doe* d. *Chandler* v. *Ford*, 5 Nev. & M. 209. *Vide ante*, p. 349, and the remarks on Illegal Contracts, *infra*, tit. Bond.

Parol evidence to aid *construction*.

Evidence to assist Construction.]—Next, as to the use of parol evidence in the construction of instru-

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ments (*e*). The Court must always, as far as possible, put itself in the position of the parties to the instrument; it must acquaint itself, wherever that is necessary, with the meaning which the parties *habitually* affixed to the words used by them; it must know what circumstances were known to them, and what were unknown, in order to ascertain, not what they intended to put into writing, but what meaning they attached to the words actually used by them; and in order to obtain this information, parol evidence must be resorted to: *Shore* v. *Wilson*, 9 Cl. & F. 555; *Carr* v. *Montefiore*, 33 L. J., Q. B. 256 (*f*). As to the construction to be put upon an instrument executed by foreigners in a foreign country, see *King of Spain* v. *Machado*, 4 Russ. 225 (*g*). If the writing is in a foreign

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(*e*) It may be observed, that, in the construction of an instrument, the punctuation, parenthetical characters, &c., are invariably disregarded: *Sanford* v. *Raikes*, 1 Mer. 651.

(*f*) In the construction of an ancient Act of Parliament, or a private writing, evidence of usage, that is, of the construction which at the time of the making of the act or writing, or as far back as can be shown, was put upon it by the acts of parties concerned, is admissible to show the meaning which doubtful expressions then bore: Bac. Ab. stat. (T. 5): *Bank of England* v. *Anderson*, 4 Scott, 50; *Rex* v. *Varlo*, Cowp. 248; *Rex* v. *Miller*, 6 T. R. 268; *Kitchen* v. *Bartsch*, 7 East, 60; *Bailiffs, &c. of Tewkesbury* v. *Bricknell*, 2 Taunt. 120; *Weld* v. *Hornby*, 7 East, 199; *Stammers* v. *Dixon*, Id. 200; *Withnell* v. *Gartham*, 6 T. R. 388. But the acts of the parties are not allowed to influence the construction of a recent instrument, being no evidence of the meaning of the terms used in it. See *Wadley* v. *Bayless*, 5 Taunt. 752; *Atkinson* v. *Pilsworth*, 1 Ridgw. P. C. 449; *Davis* v. *Oliver*, Id. 9; *Clifton* v. *Walmsley*, 5 T. R. 564; *Iggulden* v. *May*, 7 East, 237; *Cholmondeley* v. *Clinton*, 4 Bligh, 1. But in equity, upon a question of fraud or mistake, the conduct of the parties at the time may be significant: *Bawtery* v. *Ibson*, 1 Ch. Cas. 46.

(*g*) Contracts made in one country relating to land, houses, &c. (immovable property) situate in another country are interpreted according to the laws of the country in which they are situate (*lex loci rei sitæ*): Story, Conflict of Laws, ss. 424, 428. See also *Duncan* v. *Cannan*, 23 L. J., Ch. 265; *Chamberlain* v. *Napier*, 15 Ch. D. 614. With this exception it is the general rule that contracts are interpreted according to the law of the place in which they are made: Story, Conflict of Laws, s. 274; *Trimberg* v. *Vigier*, 1 Bing. N. C. 151; *De la Vega* v. *Vianna*, 1 B. & Ad. 284; and accordingly the Court, in interpreting a

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language, or in an ancient character, its purport is ascertained by the testimony of persons skilled in the language or character: *Masters* v. *Masters*, 1 P. Wms. 425; *Norman* v. *Morrell*, 4 Ves. 769: *Goblet* v. *Beechy*, 3 Sim. 24; *Di Sora* v. *Phillips*, 10 H. L. Cas. 624, *et vide ante*, tit. ABSTRACTS, p. 163. If it contains technical expressions, the meaning of those expressions is taken from competent witnesses: *Clayton* v. *Gregson*, 4 Nev. & M. 602; *Goblet* v. *Beechey*, 3 Sim. 24; *Hutchinson* v. *Bowker*, 5 Mee. & W. 535. And where the instrument contains only words of ordinary occurrence, if it appear on the face of it, or is made out by averment, that the parties belong to a class of persons by whom, or live in a district where, in similar transactions, the words are used in a different sense, parol evidence of the meaning attributed to the words by usage will be admitted. See *Humphrey* v. *Dale*, 7 E. & B. 266; E. B. & E. 1004; *Fleet* v. *Murton*, L. R., 7 Q. B. 126. And the principle is not confined to mercantile instruments. Thus, in an action on a covenant in a lease of a warren for rabbits, left on the warren at a certain rate per thousand, evidence was admitted to show, that, in that part of the country, a *thousand* meant *twelve hundred: Smith* v. *Wilson*, 3 B. & Ad. 728 (*h*). So, it was allowed

Technical words.

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foreign contract, will require evidence of the foreign law applicable to it, and of any peculiar rules of construction which may exist in that law: *Di Sora* v. *Phillips*, 10 H. L. Cas. 624. See also *Male* v. *Roberts*, 3 Esp. 163; *Baron de Bode's case*, 8 Q. B. 208. But if it is intended that the contract shall be performed in a country different from that where it is made, it must be construed according to the law of the country in which it is to be performed; and if no place of performance is expressed or implied, the law of the country where the contract was made will prevail: Story on Contracts, s. 803. See *Robinson* v. *Bland*, 1 W. Bl. 256. If, however, an action is brought in one country to enforce a contract made in another country, the law of the country in which the remedy is sought (*lex loci fori*) will govern the mode and time of proceedings, and all that relates to the conduct thereof: *Bullock* v. *Caird*, L. R., 10 Q. B. 276.

(*h*) But not if the legislature has affixed a certain meaning to expressions relating to weights and measures, &c. See *Smith* v. *Wilson; Master, &c. of St. Cross* v. *Lord Howard de Walden*, 6 T. R. 338.

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to be proved, that, among mercantile men, the Gulf of Finland was considered as part of the Baltic: *Uhde* v. *Walters*, 3 Camp. 16. So where, on a sale of goods, the bought note stated, that the goods were to be delivered by the seller from certain vessels *expected to arrive about November or December*, and the sold note mentioned no time of arrival, the variance was held to be immaterial, upon parol evidence, that, by the usage of merchants, the words *expected to arrive* created no contract, but were a mere representation; and that the arrival within a given time must be *warranted*, to make it part of the contract: *Bold* v. *Rayner*, 1 M. & W. 343. See *Lethulier's case*, 2 Salk. 443; *Baker* v. *Paine*, 1 Ves. sen. 459; *Vallance* v. *Dewar*, 1 Camp. 503, and cases there cited: *Robertson* v. *French*, 4 East, 130; *Powell* v. *Horton*, 3 Scott, 110; *Taylor* v. *Briggs*, 2 Car. & P. 525; *Noel* v. *Lord Rochfort*, 4 Cl. & F. 351.

Incidents to agreements implied by the common law.

The universal usage of the country, or, in other words, the common law, has annexed various incidents, or implied agreements, or conditions to contracts and other transactions, whether oral or reduced to writing, beyond those which are in express words stipulated between the parties, and enforces the observance of those implied or incidental terms, so far as they are consistent with what is actually expressed by the agreement. Thus, a stipulation for a tenancy at a fixed rent, implies a right of distress in the landlord, and an assignment of a tenancy implies an obligation on the assignee to indemnify the assignor. So, in equity, a conveyance of land as a security, subject to redemption on a day named, implies a right of redemption after that day has passed; and, upon various dealings, trusts and rights arise or are extinguished by implication from the circumstances (*ante*, p. 333). Most of these are properly cases of *construction*, in which the particular terms or conditions agreed upon are considered as symbols or tokens of the entire arrangement intended. Thus the expression "rent-service" of itself has the legal meaning of a certain periodical payment, arising out of the relation of

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lessee and reversioner, and enforceable by ascertained methods. If, therefore, two parties constitute between themselves that relation, and stipulate for the payment of a certain periodical sum, all the incidents of a rent-service are considered to have been impliedly agreed upon, as much as if the expression, "rent-service," had been actually used; in other words, the significancy of language is attributed to the situation into which the parties place themselves.

Incidents annexed to agreements by particular usages.

The depositaries and the only evidence of the general customs of the realm or common law are the breasts and knowledge of the judges, and no further proof of matters of such general import and notoriety is required or admitted by the Courts; although the usages of particular places or classes of persons, by which also, as we shall see, additional terms and conditions may be imported into contracts, are not generally matters of judicial notice, and must be proved by the parties insisting on them (*h*). In the cases in which parol evidence of local usages has been offered for the purpose of construing written instruments, a distinction is taken between particular and general usage; for a usage may be general, although it affects only a particular class of transactions, or a particular body in the community, of which the whole of that portion of the common law, which is called the law of merchants, is an instance; and such usages, when once ascertained, are not to be questioned. Thus, when a bill of exchange is drawn, payable to A., the law, without any inquiry as to mercantile usage, in that particular case, intends that it is meant to be payable to A. *or order: Edie* v. *East India Company*, 1 W. Bl. 299. See *Vallezjo* v. *Wheeler*, Lofft, 631. But a general custom is but an aggregate of particular customs; and if the existence of an alleged custom has not been previously recog-

What particular usages are recognised by the common law.

Custom of merchants.

(*h*) Usages of particular places, or classes of persons, do not bind persons living at a distance, or belonging to different classes, and who are unacquainted with such usages: *Bartlett* v. *Pentland*, 10 B. & C. 770; *Sweeting* v. *Pearce*, 9 C. B., N. S. 534.

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nised by the Courts, inquiry will be made and evidence admitted, to sustain the fact; though, where it is once found to be a general custom, it becomes by that finding the law of the land. See *Hunter* v. *Buring*, cit. in *Haille* v. *Smith*, 1 Bos. & P. 567.

Evidence of usage to affect construction.

The limits of the admissibility of evidence of usage, in order to the construction of written contracts, are not very exactly defined. "How far," said *Tindal*, C. J., in *Whittaker* v. *Marson*, 2 Scott, 581, "a mercantile custom reduced to writing and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of the general course and usage of the trade within the limits of which the contract was made, and to which it relates, is a question which it would be difficult to answer with exactness and precision." In the case of *Hutton* v. *Warren*, 1 Mee. & W. 466, the question arose upon the rights, by local usage, of an outgoing tenant; and *Parke*, B., in delivering judgment, took occasion to review the leading authorities. "It has long been settled," observed that learned judge, "that in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life in which known usages have been established and prevailed; and this has been done upon the principle of presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations not altered by the contract are to remain in force, that it is too late to pursue a contrary course, and it would be productive of much inconvenience if this practice were now to be dis-

Usage.

Hutton v. *Warren*.

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turbed"(*i*). See, also, *Wigglesworth* v. *Dallison*, Doug. 201; 1 Smith, L. C., 8th ed., p. 594; *Webb* v. *Plummer*, 2 B. & Al. 750; *Hughes* v. *Gordon*, 1 Bligh, 287; *Anderson* v. *Pitcher*, 2 Bos. & P. 168; *Cutter* v. *Powell*, 6 T. R. 320; *Doe* d. *Hall* v. *Benson*, 4 B. & Al. 588; *Roberts* v. *Barker*, 1 Cr. & M. 803; *Reading* v. *Mendham*, 1 M. & Rob. 236; *Magee* v. *Atkinson*, 2 M. & W. 442.

Usage not admitted to contradict a writing.

Though evidence of usage is allowed to explain an ambiguous contract, or to add terms which are consistent with those expressed, it will not be allowed to control the clear language of the instrument. The meaning sought to be given by such evidence to the contract must not be either expressly or by implication inconsistent with the terms of the instrument. See *Yeates* v. *Pym*, 6 Taunt. 445; 2 Marsh. 141; *Roberts* v. *Barker*, 1 Cr. & M. 803; *Cross* v. *Eglin*, 2 B. & Ad. 110; *Cuthbert* v. *Cumming*, 24 L. J., Ex. 200; *Hayton* v. *Irwin*, 5 C. P. D. 130.

Parol evidence necessary to ascertain the *application* of a writing to the facts.

Besides resorting to parol evidence for the purpose of ascertaining the general meaning which the words of a written instrument bore among the class of persons by whom, or under the circumstances in which, it was made, parol evidence must be more or less relied upon for the purpose of applying the words of the writing to the facts of the case(*k*). Thus, before a conveyance to A. B., "of the manor of S." can be acted upon, it must be shown to what estate that description is applicable, and who is the person called A. B.: *Quaintrell* v. *Wright*, Bunb. 274. As to the question how far the intention of a testator may be collected from collateral and foreign circumstances, see the remarks of Lord *Hardwicke*, C., in *Goodinge* v. *Goodinge*, 1 Ves. sen. 231.

(*i*) The Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), sects. 57, 60, excludes all compensation by custom or otherwise in cases where compensation can be claimed under that Act. See as to local customs, Woodfall, L. & T. 12th ed. (by Lely), pp. 727, 737 *et seq.*

(*k*) The circumstances of the case may also be looked at for the purpose of seeing what is the reasonable construction of words of an indefinite nature: in accordance with the maxim, "Verba generalia restringuntur ad habilitatem rei vel aptitudinem personæ."

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So in *Owen* v. *Thomas*, 3 Myl. & K. 353, a letter written by the defendant to his solicitor was held sufficient evidence of an agreement for a sale, although the property was only described as "the house in Newport," and the letter contained a statement by implication that the title-deeds were in the possession of a Mr. Deere. In *Ogilvie* v. *Foljambe*, 3 Mer. 53, the words "Mr. Ogilvie's house," and in *Bleakley* v. *Smith*, 11 Sim. 150, the words, "the property in Coity Street," were held to be sufficient descriptions. In *Sanford* v. *Raikes*, 1 Mer. 646, a testator devised "the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down." This was held to amount to a direction that the estate should be so paid for; and as to admissibility of evidence, Sir *W. Grant*, M. R., said: "I had always understood that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent but necessary to admit extrinsic evidence to ascertain the fact, and through that medium to ascertain the subject of the devise." See *Doe* d. *Templeman* v. *Martin*, 1 Nev. & M. 512.

Parcels, &c. identified by parol evidence.

Reference to a plan.

In *Hodges* v. *Horsfall*, 1 Russ. & M. 116, an agreement for granting a lease contained a provision for additions intended to be made by the lessee "as per plan agreed upon." It appeared that in the course of the negotiations several plans were produced; but it was held by Lord *Lyndhurst*, C., that the particular plan agreed upon might be identified by parol evidence.

Latent ambiguity.

Where a person gave to his bankers a cheque by deed upon certain premises described as "three leasehold houses in C., held by the mortgagor under a lease dated the 25th of September," which lease in fact comprised only one of the houses, evidence was admitted to show that during the negotiations the mortgagor pointed out three houses, two of which were comprised in another lease, and offered them as the security for the loan: *Re Boulter*, 4 Ch. D. 241. The rule as stated by Mr. Dart is that "a general description is sufficient if parol evi-

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dence can be produced to show what property was intended :" V. & P. 219. The question is fully considered by Lord *St. Leonards* in Sugd. Vend. pp. 134, 169. See also *Shardlow* v. *Cotterell*, 20 Ch. D. 90.

Rules of construction. Words taken in the primary meaning, if sensible with reference to extrinsic facts.

Having ascertained, by reference to extrinsic circumstances, if necessary, what is the strict and primary meaning which the words of the instrument bear *in the abstract*, the next step is to apply them to the particular circumstances of the case, and if a distinct and reasonable meaning and effect can be given to them with reference to those circumstances, no evidence of intention shall be allowed to show that the words were in fact used in a different sense and to effectuate a different intention: *Green* v. *Howard*, 1 Br. C. C. 31; *Butcher* v. *Butcher*, 1 Bos. & P. N. R. 113.

Evidence admitted to show how the words were understood by those using them.

But if the words as so interpreted cannot be reasonably applied to any existing circumstances, the Court will take into consideration all the circumstances (and among other things will admit, if necessary, evidence as to what matters were within the knowledge, memory, or contemplation of the parties at the time), and see whether any meaning can be reasonably attributed to the words which is not their proper meaning, so as to give to them some effect with reference to the actual circumstances; and this whether there is any ambiguity apparent on the instrument or not: *Eden* v. *Earl of Bute*, 3 B. P. C. 679; *Verlander* v. *Codd*, Turn. & R. 357; *Allan* v. *Cameron*, 1 Cr. & M. 832; *Giles* v. *Giles*, 8 Sim. 360. In *Colpoys* v. *Colpoys*, Jac. 464, Sir *T. Plumer*, M. R., said: "When a legacy is given to a man by his surname, and his christian name is not mentioned, is not that a patent ambiguity? yet it is decided that evidence is admissible. So where there is a gift of the testator's stock, that is ambiguous; so it has a different meaning when used by a farmer and a merchant. So with a bequest of jewels; if by a nobleman, it would pass all; if by a jeweller, it could not pass those which he had in his shop. Thus the same expressions may vary in meaning, according to the circumstances of the testator." See *Le Farrant* v. *Spencer*, 1 Ves. sen. 97: *Green* v. *Howard*, 1 Br. C. C. 31; *Doe* d. *Gore* v. *Langton*, 2 B. & Ad. 695; *Black-*

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well v. *Bull*, 1 Keen, 176; *Willis* v. *Curtois*, 1 Beav. 189. From the authorities just cited it appears that the construction of words which have ordinarily no strict and definite meaning, such as "stock," "family," &c., must always be determined by the particular circumstances of the case. If the words are found upon reference to the extrinsic circumstances to bear indifferently two meanings, as, if a description of a person is applicable to two persons, or a description of a thing to two things, and it appear that one only is meant, it is concluded that only one meaning was at the time present to the mind of the person making use of the words; and if the writing itself affords no ground of construction for determining the question, *Doe* d. *Westlake* v. *Westlake*, 4 B. & Al. 57, evidence is admitted to show what meaning was so present, and for this purpose the party's own declarations of intention may be proved (*l*). But if the words are on the face of them indeterminate, and do not grammatically import one ascertained person or thing, as where a gift is made to "one of the sons of A," 2 Vern. 624, the inference that only one meaning was present is necessarily excluded; and to admit evidence of intention in order to fix a certain meaning upon the ambiguous words, would be not to show what the writing means, but to express that by parol which the writing, on the face of it, does not purport to express. See *Butcher* v. *Butcher*, 1 Bos. & P., N. R. 113. Hence the maxim, *Ambiguitas latens verificatione suppletur* (*m*). The rule that a *patent* ambiguity cannot be removed by evidence must (especially since the case of *Doe* d. *Gord* v. *Needs*, 2 M. & W. 129, be taken with the very important qualification

Latent and patent ambiguities.

(*l*) If the intention cannot be ascertained, the clause fails for uncertainty, except in the case of a bequest to charitable purposes; when, if there are two charities equally answering the description, the gift will be executed *cy pres*, dividing it between them: *Simon* v. *Barber*, 5 Russ. 112; *Bennett* v. *Hayter*, 2 Beav. 81.

(*m*) The dictum in *Shortrede* v. *Cheek*, 1 Ad. & El. 57, which seems to be inconsistent with this rule, is perhaps distinguishable on account of the particular doctrine for which it is cited in the page referred to, namely, that it is essential to the validity of a guarantee that the consideration should be stated.

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that an ambiguity which does not appear by the very words or clause of which the meaning is in question, is susceptible of explanation by averment, although, taking the whole of the writing together, the ambiguity is apparent without reference to extrinsic circumstances; a clause which is complete in itself and expresses a distinct unambiguous intention, will not be taken out of the reach of parol explanation by a wholly distinct clause in the same instrument, which discloses facts upon which the ambiguity arises. In the case referred to, there was a devise to "George Gord, the son of Gord;" and by other devises in the same will, it appeared that there was a George Gord, the son of George Gord, and another George Gord, the son of John Gord; yet evidence of intention was admitted to show which was meant (*m*). See *Price* v. *Page*, 4 Ves. 680; *Colpoys* v. *Colpoys*, Jac. 464. So a mere inaccuracy or obscurity, though patent, may, consistently with this rule, be explained by reference to extrinsic *circumstances;* for though words, which it must be concluded were inexpressive or ambiguous to the apprehension of the parties themselves, cannot be eked out by evidence of *intention*, yet the writing itself is not conclusive evidence that the words were so deficient in meaning, and extrinsic facts may be looked to for the purpose of discovering whether words, apparently senseless or ambiguous, had a definite meaning in the minds of those who used them (*n*). And words which have no meaning at all with reference to the facts may be rejected for the purpose of giving effect to words with which they

Rejection of senseless words.

(*m*) A point similar to that which occurred in the case of *Doe* v. *Needs* was attempted to be raised in *Doe* d. *Morgan* v. *Morgan*, 1 Cr. & M. 235, where the testator devised an estate to his wife for life, and then to "his nephew Morgan Morgan," and immediately afterwards devised another estate in possession to "his nephew, Morgan Morgan, of the village of Mothvey." The Court held, that there was a latent ambiguity, and admitted evidence of the testator's declaration. See *Doe* d. *Westlake* v. *Westlake*, 4 B. & Al. 57; *Doe* v. *Allen*, 4 Jurist, 985.

(*n*) See *Doe* d. *Malden* v. *Miller*, 1 B. & Al. 699. This does not seem to be a case of *ambiguity*, that is to say, of *double* meaning.

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are associated, and which are capable of a certain application—this is the maxim: "*Falsa demonstratio non nocet.*" "It is a true canon of construction that where a word is found in a statute, or in any other instrument or document which cannot possibly have a sensible meaning, we not only may, but must, eliminate it in order that the intention may be carried out:" Per *Archibald*, J., in *Stone* v. *Corporation of Yeovil*, 1 C. P. D. 705. So where there is a personal covenant, followed by a proviso that the covenantor shall not be personally liable under the covenant, the proviso must be rejected as repugnant and void: *Furnivall* v. *Coombes*, 5 Man. & Gr. 736; *Williams* v. *Hathaway*, 6 Ch. D. 544. The Court will correct an error which is evidently merely clerical: *Wilson* v. *Wilson*, 5 H. L. Cas. 40. That which, *under the circumstances*, has no meaning, may be considered in the light of surplusage, and parol evidence is allowed to remove surplusage, though not to supply defects: Godbolt, 131. See *Hodgson* v. *Hodgson*, 2 Vern. 593; *Atkinson* v. *Pilsworth*, 1 Ridgw. P. C. 461. On this question the reader may be referred to the remarks of Lord *Bacon*, which, though not always consistent with authority, throw considerable light on the subject. See Maxims, Reg. 13, 23, 25.

Lord Bacon's maxims.

The present state of the law upon the subject was very elaborately examined in the three cases of *Miller* v. *Travers*, 1 Moo. & Sc. 342; *Doe* d. *Gord* v. *Needs*, 2 M. & W. 129; and *Doe* d. *Hiscocks* v. *Hiscocks*, 5 M. & W. 363, by which it is thought to have been placed upon a satisfactory foundation. They were cases which arose upon the construction of wills (*o*); and the observations of the judges who decided them were generally confined to that class of instruments; but there is no difference between wills and other instruments, so far as this subject is concerned; some few words have a settled technical meaning in deeds, which are more flexible in wills,

Decisions as to the admissibility of parol evidence in aid of construction.

Rules of evidence are the same with respect to deeds as to wills.

(*o*) These cases will be stated and fully considered in treating of the question of the construction of wills, *infra*, *sub.* tit. Wills.

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not because parol evidence is less easily admissible to explain deeds than wills, but in consequence of certain settled rules of construction, which do not allow of the use of different words in deeds, however clear they may be to express intention. See *Bayley* v. *Morris*, 4 Ves. 788; *Goodtitle* d. *Edwards* v. *Bailey*, Cowp. 600; *Gibson* v. *Minet*, 2 Br. P. C. 48; *S. C.*, 3 T. R. 481; *Solly* v. *Forbes*, 4 J. B. Moo. 448 (*p*).

Parol waiver of a written contract. Agreement under seal can only be varied or waived by specialty.

Parol Variation or Waiver of an existing Contract.]—An agreement or obligation under seal cannot be varied or abandoned by parol; but only by acceptance, after a breach, of something in satisfaction of damages, *Heard* v. *Wadham*, 1 East, 619; or by matter of as high a nature; according to the rule of the civil law, which is adopted by the English law: "*Nihil tam naturale est quam eo genere quidquid dissolvere quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensûs obligatio contrario consensu dissolvitur:*" Dig. xvii. 33; *Blake's case*, 6 Rep. 43 b.; *Alden* v. *Blague*, Cr. Jac. 99; *Blennerhasset* v. *Pierson*, 3 Lev. 234; *Roe* d. *Gregson* v. *Harrison*, 2 T. R. 425; *Kaye* v. *Waghorn*, 1 Taunt. 428; *Braddick* v. *Thompson*, 8 East, 344; *Thomas* v. *Courtnay*, 1 B. & Al. 1; *Sellers* v. *Bickford*, 1 J. B. Moore, 460; *Thomson* v.

(*p*) Thus Lord *Kenyon*, C. J., said: "In deeds certain legal phrases must be used in order to create certain estates; as the word 'heirs,' to create a fee, and 'heirs of the body,' to create an estate in tail. But beyond that I would say, with Lord *Hardwicke*, that there is no magic in particular words, further than as they show the intention of the parties:" *Wright* d. *Burrill* v. *Kemp*, 3 T. R. 473. In *Doe* d. *Freeland* v. *Burt*, the defendant claimed under a lease from the assignee of the plaintiff, of certain parts of a house in town, described to be "one room on the ground-floor, with the cellar thereunder, and a vault contiguous and adjoining thereto, and three rooms," &c., and the whole were devised to have been late in the occupation of A. Evidence was admitted to show that at the time of the lease the vault was in the occupation of B., another tenant, and not intended to pass. *Ashurst*, J., said: "It seems to me the construction of all deeds must be made with a reference to their subject-matter, and it may be necessary to put a different construction in cases made in populous cities from that on those made in the country. In the present case, considering the nature of the property, it was proper to let in evidence to show the state and condition of it at the time the lease was granted:" 1 T. R. 701.

Brown, Id. 358; *Cordwent* v. *Hunt*, 2 Id. 660; overruling *Hotham* v. *E. I. Co.*, Doug. 272. But, at the common law, a writing unsealed, was not of a higher nature than words spoken, and might, therefore, be either discharged or varied by parol subsequently to its execution: Per cur. *Goss* v. *Lord Nugent*, 2 Nev. & M. 28; *S. C.*, 5 B. & Ad. 58, *post*, p. 375 (*q*); *Harvey* v. *Grabham*, 6 Nev. & M. at p. 761. But a cause of action arising out of a breach of a written or oral contract can only be discharged by a release under seal, which requires no signature: *Taunton* v. *Pepler*, 6 Madd. 166, or by the receipt of something in satisfaction of the wrong done: *Langdon* v. *Stokes*, Cr. Car. 383; Vin. Abr. *Contract*, G. 17; *Willoughby* v. *Backhouse*, 4 Dowl. & R. 539; 2 B. & Cr. 821; *Baylis* v. *Usher*, 4 Moo. & P. 791. Other acts, such as the destruction of the note or instrument evidencing the debt will, in equity, amount to a release: *Gilbert* v. *Wetherell*, 2 Sim. & Stu. 254.

Parol Waiver of a Written Contract.

A simple contract may be waived or varied at common law by parol.

Cause of action, how discharged.

The Statute of Frauds declares, that no contract or agreement concerning land shall be enforced, unless it is in writing. A parol agreement to waive or annul a previously written contract for the sale of land, is clearly an agreement concerning land within the statute; but it is an agreement of so negative a nature, that there are not many conceivable cases in which the enactment against *enforcing* such an agreement could be applicable. However, if the purchaser has paid a deposit previously to a parol waiver of the contract, it should seem, upon principle, that he cannot recover, if the defendant chooses to insist on the contract as subsisting, and offers to perform it. In *Walker* v. *Constable*, 1 Bos. & P. 306, the action was brought by a purchaser to recover

Parol variation and waiver with reference to the Statute of Frauds.

Purchaser's remedy for his deposit after a

(*q*) Thus, a parol agreement to reduce the rate of interest upon a mortgage is valid, because a mortgage security is not considered as being real estate: *ante*, p. 294. See *Milton* v. *Edgeworth*, 6 Br. P. C. 580; *Gregory* v. *Pilkington*, 26 L. J., Ch. (N. S.) 177. Oral evidence is admissible to contradict or explain a written receipt for money: *Farrar* v. *Hutchinson*, 9 Ad. & E. 641; *Wallace* v. *Kelsall*, 7 M. & W. at p. 273; *Lee* v. *Lancashire and Yorkshire Rail. Co.*, L. R., 6 Ch. 527.

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parol abandonment of the contract.

back his deposit, with interest, and the costs of investigating the title, the contract having been abandoned. There was also a count for money had and received. The plaintiff, not having produced a written contract in support of his declaration, was nonsuited by *Eyre*, C. J.; and, on a rule to set aside the contract, the Court were of opinion that the contract itself must be shown before it could be proved to have been abandoned; from which it may be inferred that they thought that an abandonment by parol might have been proved; but there seems to have been nothing to suggest that as a question. Of course, the plaintiff was entitled to recover the deposit, without interest, upon the count for money had and received: Ib. See *Adams* v. *Fairbain*, 2 Stark. 277. On the other hand, as the statute only says that such parol agreement shall not be enforced by action, there seems to be no objection to the use of a parol waiver, in answer to an action or suit for enforcing the written agreement: *Bell* v. *Howard*, 9 Mod. 302. The authorities upon these points are not quite consistent.

Parol variation of a written agreement.

Jordan v. *Sawkins.*

First, as to the parol varying of a written agreement which is within the statute. In *Jordan* v. *Sawkins*, 1 Br. C. C. 389, it was argued that, as a written agreement for a lease might be wholly waived by parol, it might be agreed by parol that it should commence at a subsequent day to that mentioned in the writing; but Lord *Thurlow* held, that the different period of commencing the lease made a material variation, as it gave the estate from the owner for so many months longer; and he allowed a plea of the Statute of Frauds. But, he said, if the agreement had been, not to postpone the expiration of the term, but only its commencement, that would have done, because it would be no variation, but only waiving a part: 1 Ves. jun. 404. See some remarks on this case in *Robson* v. *Collins*, 7 Ves. 133, where performance of variations, manifested by writing, was refused on the ground of want of consideration.

Price v. *Dyer.*

In *Price* v. *Dyer*, 17 Ves. 356, specific performance of a written contract for a lease was granted,

without reference to parol variations insisted upon by the defendant, but which had not been acted upon by him. Sir *W. Grant*, M. R., said: "The defendant has expended nothing upon the faith of having the added stipulations performed. He has sustained no positive loss. He will only be disappointed of that advantage which he expected to receive from the gratuitous covenants of the plaintiff." See *Robinson* v. *Page*, 3 Russ. 114, where the plaintiff, offering to the defendant the benefit of parol variations, the defendant was allowed the option of having the original agreement performed, with or without those variations.

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In a case at law, it was held, that the time limited by the written agreement for the performance of a contract for the sale of goods might be extended by parol: *Warren* v. *Stagg*, cited in *Littler* v. *Holland*, 3 T. R. 591; see also *Cuff* v. *Penn*, 1 Mau. & S. 21; *Thresh* v. *Rake*, 1 Esp. 53. These cases have since been distinctly overruled.

Parol variation: Cases at law.

In *Goss* v. *Lord Nugent*, 2 Nev. & M. 28; 5 B. & Ad. 58, land had been sold under a written contract, by which the vendor was bound to produce a good title; and in an action on the contract, the plaintiff (the vendor) insisted on a subsequent parol waiver by the defendant of that stipulation, but the evidence was held to be inadmissible.

Goss v. *Lord Nugent.* Agreement to produce a good title cannot be varied by parol.

Lord *Denman*, C. J., said: "The object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only. But in the present case, the written contract is not that which is sought to be enforced; it is a new contract which the parties have entered into, and that new contract is to be proved partly by the former written agreement, and partly by the new verbal agreement. The present contract, therefore, is not a contract entirely in writing; and as to the title being collateral to the land, the title appears to us to be a most essential part of the contract; for, if there be not a good title, the land may in some cases better not be conveyed at all. But our opinion is not framed

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upon the stipulation about the title being an essential part of the agreement, but upon the general effect and meaning of the Statute of Frauds, *that the contract now brought forward by the plaintiff is not wholly a contract in writing.* See *Earl of Falmouth* v. *Thomas*, 1 Cr. & M. 89, *ante*, p. 288.

And an entire contract, within the statute, part of the subject-matter of which would not be within the statute, if it stood alone, cannot be varied as to that part by parol. In *Harvey* v. *Grabham*, 6 Nev. & M. 754; 5 A. & E. 61, by the written agreement the plaintiff was to grant a lease to the defendants, and the defendants were to take certain quantities of straw and other things at a valuation, to be made by competent persons, respectively appointed by the parties, or their umpire. The plaintiff relied upon a subsequent agreement to adopt a valuation to be made by one C. A plea that this last agreement was not in writing was held good.

Harvey v. *Grabham.*

Parol agreement to vary mode of valuation.

But, if a contract concerning land has been executed, a subsequent parol agreement concerning a matter provided for by the original contract may be made, if it does not affect the interest in the land. Thus, in *Hoby* v. *Roebuck*, 7 Taunt. 157; 2 Marsh. 433, after a lease had been executed, a parol agreement by the lessee to pay an additional sum per annum, in consideration of improvements made by the lessee, was supported on the ground that the stipulated annual payment was not to be considered as partaking of the nature of rent. See *Price* v. *Leyburn*, Gow, 109; *Lambert* v. *Norris*, 2 M. & W. 333; *ante*, pp. 291, 292; and *infra*, tit. Leases.

Collateral agreement after the original contract has been executed.

In *Stowell* v. *Robinson*, 5 Scott, 196, it was held, that a written contract for the sale of a leasehold public-house, in which was a stipulation for delivery of possession on a certain day, could not be varied by a subsequent parol agreement for delivery of possession on a later day. The parol waiver was set up by the defendant, who was the vendor. But where the plaintiffs entered into an agreement in writing with the defendant to let him a public-

Stowell v. *Robinson.*

house as tenant from year to year, with the option on his part to call on them to grant him a lease of the house for twenty-eight years, upon certain terms which the defendant contended were subsequently varied by a substituted agreement by parol, it was held that such substituted agreement must be in writing to satisfy the statute. But semble, per *Amphlett*, B., that if there had been anything in writing to show that the lease granted was accepted in substitution for that originally stipulated for, the action might have been maintained: *Sanderson* v. *Graves*, L. R., 10 Ex. 234.

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In *Stead* v. *Dawber*, 2 Per. & D. 447; *S. C.*, 10 Ad. & El. 57, the plaintiff stated a written contract for the sale of goods to him, to be delivered on the 22nd of May, and that the plaintiff afterwards, at the request of the defendants, gave them time for delivery until the 24th of May, assigning for breach non-delivery on the 24th. The defendants pleaded, that the extension of the time for delivery formed part of a contract between the plaintiff and defendants for the sale of goods for the price of upwards of 10*l.*; that the plaintiff did not accept any part of the goods, nor give anything in earnest; and that no note or memorandum in writing of the bargain was signed by the defendants, or either of them, or by their agent. Replication, that the said giving of time, &c., was not part of the contract for the sale of the goods; and issue joined. The defendants succeeded upon this plea; the Court holding, that the parties had substituted a new contract for the old one—the same as the old one in all respects, except as to the day of delivery and the date of the accepted bill (which depended on the time of delivery). See *Price* v. *Dyer*, 17 Ves. 356; *ante*, p. 374; *Jackson* v. *Galloway*, 6 Scott, 792.

Time of delivery an essential part of contract for sale of goods of a fluctuating value.

Stead v. *Dawber.*

Parol variation of a written contract held to be a total abandonment of it.

In *Marshall* v. *Lynn*, 6 M. & W. 109, the point was decided generally on the authority of *Stead* v. *Dawber*, that the time for performing a written contract within the 17th section of the Statute of Frauds, if mentioned in the writing, cannot be afterwards varied without writing. *Parke*, B., said: "It seems to me to be unnecessary to inquire, what are

Marshall v. *Lynn.*

Contract required to be in writing by the statute cannot be varied by parol.

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the *essential* parts of the contract, and what not; and that *every* part of the contract, in regard to which the parties are stipulating, must be taken to be material."

No part of a written contract considered to be immaterial at law.

In *Carpenter* v. *Blandford*, 3 Man. & Ry. 91; 8 B. & Cr. 575, by the agreement the deposit was to be forfeited if the purchaser did not complete his side of the agreement, part of which was for an appraisement of stock in trade on a certain day; and the plaintiff (the vendor), having been informed that the defendant could not complete the appraisement until the following day, and not having objected at the time, it was held, that he could not on the following day object and claim the forfeiture, but that the plaintiff might recover his deposit. The Court said, that a forfeiture was *strictissimi juris*, and the defendant must show that he had done everything which he was bound to do, to entitle him to insist on the forfeiture, and that he had not done anything to waive that right. The nature of the stipulation in this case seems to distinguish it from those which have been previously cited: *vide*, *infra*, tit. Leases.

Forfeiture may be waived by parol or by conduct.

Carpenter v. *Blandford.*

The well-known rule in equity is, to consider stipulations as to time binding or not, according to the subject-matter and the nature of the contract and the conduct of the parties. See Sugd. Vend. 260 *et seq.*

Parol variation partly acted upon may be enforced.

If the parol variation has been acted upon by either party, so that to allow the other to insist on the original contract would be to sanction a fraud, the principle discussed, *ante*, p. 351, comes into operation, and specific performance of the contract, as varied, may be enforced in equity. Thus, in an *Anonymous case* in Viner (*Contract*, H. 38), W. leased a house to N. for eleven years, and by the written agreement was to allow 20*l.* to be laid out in repairs; N. repaired the house, and finding it to take a much greater sum than 20*l.*, offered to W. to go on, and lay out more money, if he would enlarge the term to twenty-one years, or add fourteen, or as many as N. should think fit. W. replied that they would not fall out about that, and afterwards declared that he would enlarge the term, without mentioning any certain term. The Master of the Rolls said, that,

before the statute, written agreements could not be controlled by a contemporaneous parol agreement contrary to it, or altering it; but this was a new agreement, and the laying out the money was a performance on one part, and ought to be carried into execution; and he built his decree upon two cases; first, where a parol agreement was for a building lease, and before it was reduced into writing the lessee began to build, and after differing on the terms of the lease, the lessor brought a bill, and the lessee insisted on the Statute of Frauds; the Lord Keeper dismissed the bill, but the plaintiff was relieved in Dom. Proc.; and the second was a case in Lord *Jefferies*' time.

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So, in *Legal* v. *Miller*, 2 Ves. sen. 299, the written agreement being that the lessor should repair, and it being found that it would be better to pull the house down entirely, though more expensive to the owner, it was agreed by parol that that should be done, the tenant paying an additional rent. This was allowed to be a good defence to a bill by the tenant for a specific performance according to the written agreement. See *Earl of Anglesey* v. *Annesley*, 4 Br. P. C. 421; *Price* v. *Dyer*, 17 Ves. at p. 364. And, in *Van* v. *Corpe*, 3 My. & K. 269, in answer to a bill seeking specific performance of an agreement for a lease, the defendants set up a subsequent parol agreement, that, in consideration of certain alterations being made in the premises by the defendants, the plaintiff would execute a lease containing a covenant against carrying on certain trades, which was not provided for by the written agreement; and Sir *J. Leach*, M. R., held, that if that were proved, being made upon valuable consideration, the plaintiff would be bound by it as well as the defendants.

Legal v. *Miller*.

Van v. *Corpe*.

Lastly, as to the total abandonment by parol of a contract within the Statute of Frauds. In *Backhouse* v. *Crosby*, 2 Eq. Ab. 32; 3 Swan. 434, the evidence of an alleged parol waiver of an agreement for the purchase of land was considered inconclusive; and the Lord Chancellor said, that he would not say that a contract in writing could not

Whether a contract within the statute may be abandoned by parol.

Backhouse v. *Crosby*.

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be waived by parol, yet he should expect in such a case a very clear proof; and the proof in the present case he thought very insufficient to discharge a contract in writing; and observed, that the Statute of Frauds requires that all contracts and agreements concerning land should be in writing. Now, an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract. However, there was no occasion then to determine that point. In *Goman* v. *Salisbury*, 1 Vern. 240, a bill to have a written agreement executed in specie was dismissed, on the ground of a subsequent parol discharge. See *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 375; *Inge* v. *Leppingwell*, 2 Dick. 469; *Robson* v. *Collins*, 7 Ves. 130. Lord C. B. *Eyre*, in *Davis* v. *Symonds*, 1 Cox, at p. 406, said: "That certainly a waiver of a contract concerning lands may be by parol; the waiver is in its own nature subsequent to, and necessarily collateral to the agreement, and therefore can never bear any relation to the rule of evidence excluding parol contemporaneous variations of a writing. There might, indeed, have been another rule, that a written instrument shall not be waived by parol; but, in fact, courts of equity do not consider themselves as bound by any such rule; and it is now clear that a written agreement may be waived." In *Price* v. *Dyer*, 17 Ves. at p. 363, Sir *W. Grant*, M. R., said, that, as at present advised, he inclined to think that a parol waiver, clearly and satisfactorily proved, would be a ground for refusing to enforce performance of a written contract respecting lands. And this dictum was recognized by Sir *J. S. Copley*, M. R., in the case of *Robinson* v. *Page*, 3 Russ. 119, who observed that, undoubtedly, waiver even by parol would be a sufficient answer to a bill asking performance of a written contract. But it had been laid down in all the cases, that such a defence must be established with clearness and precision, and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into.

Goman v. *Salisbury.*

Davis v. *Symonds.*

Price v. *Dyer.*

Robinson v. *Page.*

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Noble v. *Ward*.

In the case of *Noble* v. *Ward*, L. R., 1 Ex. 117 (affirmed on appeal, L. R., 2 Ex. 135), where there was a contract in writing for the sale of goods to be delivered within a special time, and subsequently a parol agreement was entered into for extension of the time for delivery, it was held that the subsequent parol agreement was not "good" for any purpose within the meaning of sect. 17 of the Statute of Frauds, and could not operate either as a rescission of the original written contract, or as a new contract for the sale of goods, and that the original written contract might be enforced. *Bramwell*, B., remarked in the judgment, "The cases of *Goss* v. *Lord Nugent*, *Stead* v. *Dawber*, and others, only show that the new contract cannot be enforced, not that the old one is gone." See also *Moore* v. *Campbell*, 10 Ex. 323; *S. C.*, 23 L. J., Ex. 310.

Sect. 2.—Of Stamps on Agreements.

The Stamp Act, 1870 (33 & 34 Vict. c. 97), by which the older Acts are superseded, imposes the following duties on agreements (*r*), not being agreements for a lease or mortgage (see schedule to the Act):—

"AGREEMENT or CONTRACT made or entered into pursuant to the Highway Acts for or relating to the making, maintaining or repairing of highways, 6*d*.

"AGREEMENT or any MEMORANDUM of an AGREEMENT made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written statement, 6*d*.

"*Exemptions.*

"(1) Agreement or memorandum the matter whereof is not of the value of 5*l*.

"(2) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.

"(3) Agreement, letter, or memorandum made for, or relating to, the sale of any goods, wares, or merchandize.

"(4) Agreement or memorandum made between the master

(*r*) As to stamps on agreements for leases and mortgages, *vide post*, *sub.* tits. LEASES, MORTGAGES.

Stamps on Agreements.

and mariners of any ship or vessel for wages on any voyage coastwise, from port to port in the United Kingdom."

Sect. 36 of the Act enacts that "the duty of 6*d.* upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed."

Where an agreement is under seal it will bear, not the agreement stamp of 6*d.*, but the deed stamp of 10*s.*, or such other stamp as is provided in the schedule to the Act according to the nature of the instrument.

Stamp governed by the legal effect of the instrument.

What are Agreements within the Stamp Act, 1870.]—The stamp to be affixed to an instrument is to be determined by the legal effect of the instrument, and not by the form which has been given to it by the erroneous opinion of the parties respecting its operation. Thus, on the one hand, an instrument assuming the language of a conveyance, but which, from its not being under hand and seal, operated simply as an agreement, has been held to be sufficiently stamped with an agreement stamp; while, on the other hand, an instrument in terms expressive as an agreement, but which in point of construction was adjudged to be a surrender, has been held to require the stamp applicable to a surrender. An instance of the former kind is afforded by the case of *The King* v. *Inhabitants of Ridgwell*, 6 B. & Cr. 665; 9 Dowl. & Ryl. 678, where, in order to establish a derivative settlement for a pauper, an instrument to the following effect was offered in evidence, bearing a 20*s.* agreement stamp. It was intitled—An agreement made, &c., between A. B. the elder, of the one part, and A. B. the younger, of the other part; whereby A. B. the elder, in consideration of the affection which he bore to his son A. B. the younger, and for the further consideration of 19*l.* 19*s.*, did absolutely remise, release, and for ever quit claim unto his son A. B. the possession of a moiety of a certain tenement (describing it), To hold to his said son, and to his heirs and assigns, for ever; concluding as follows:—"And I the said A. B. the elder, nor my heirs, nor any other person or persons for me or them, or in my or their names, or in the right or stead of any of them, shall or will, by any ways or means hereafter, have, claim, challenge, or demand any estate,

The King v. *Inhabitants of Ridgwell.*

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right, title, or interest, be it by last will or testament, or otherwise of, in, or to the said premises, or any part or parcel thereof; but from all and every action, right, title, interest, or demand of, in, or to the said premises, or any part thereof, they and every of them shall be utterly excluded and barred for ever." It was contended, that, as the parties intended this instrument as an instrument of conveyance, it ought to have borne the stamp of 1*l.* 10*s.* imposed by the statute of 44 Geo. 3, c. 98, on every deed, instrument of conveyance, &c.; but the Court held that the stamp was sufficient, and that the instrument was receivable in evidence. See also *Wilmot* v. *Wilkinson*, 6 B. & Cr. 506; *S. C.*, 9 D. & R. 620.

Williams v. *Sawyer.*

A case supplying an example of an instrument in terms expressed as an agreement, but which was construed to be, and therefore required to be stamped as, a surrender, is *Williams* v. *Sawyer*, 6 J. B. Moore, 226, where a written agreement was given in evidence, by which P. agreed to deliver up the immediate possession of the principal part of the farm he held to his lessor (the plaintiff), who, in consideration thereof, agreed to purchase the stock, &c., and to make compensation for the fallows, which the plaintiff was to enter upon immediately, and P. was to be permitted to hold one-half of the barns, &c. for three months. This instrument was stamped with an agreement stamp of 20*s.*; but it was objected, that as, in point of fact, it amounted to a surrender of the term, it required a stamp of 1*l.* 15*s.* by the statute 55 Geo. 3, c. 184. On the other side it was contended, that, although no precise form is necessary to show a surrender in terms; yet, in order to constitute such surrender, the whole possession must be given up at the time; and here, as P. was allowed to remain in possession of part of the farm, it was a mere agreement, and not a formal surrender. But the Court was of opinion that the instrument operated as a surrender, and therefore the objection to the stamp was well founded.

What agree-

The clause in the Act in terms extends to every

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ments within the Stamp Act.

memorandum of an agreement *under hand only*, whether the same be only *evidence* of a contract, or *obligatory* upon the parties from its being a written instrument. Upon similar words in the stat. 23 Geo. 3, c. 58, Lord *Kenyon*, in *Robinson* v. *Drybrough*, 6 T. R., at p. 319, observed, that an agreement, though not under seal, may be declared on specialty, in which case it may be said to bind the parties by its own force, or the plaintiff may, in some instances, declare generally, and give the written contract in evidence. The statute was, therefore, thus particularly penned to obviate any objection which ingenuity might raise to creep out of it. A perfect agreement in writing therefore requires a stamp, and, whether stamped or not, excludes parol evidence, although the agreement which it evidences might have been made without writing. See *Hearne* v. *James*, 2 Br. C. C. 309; *Bowen* v. *Fox*, 2 Man. & Ry. 167; and *ante*, p. 344. But if the writing is a mere memorandum to prevent mistakes, and not so framed and signed as to exclude parol evidence of the matters contained in it (*infra*, p. 386), though even then it cannot be produced as evidence without a stamp, yet it may be referred to by a witness in order to refresh his memory. See *Catt* v. *Howard*, 3 Stark. 3; *Maugham* v. *Hubbard*, 2 Man. & Ry. 5; 8 B. & Cr. 14. In *Ramsbottom* v. *Tunbridge*, 2 Man. & S. 434, an unsigned paper, delivered by an auctioneer to the lessees at a letting by auction, was offered in an action for use and occupation in proof of the terms, and an objection was taken that the paper could not be read for want of a stamp, and that it excluded parol evidence. The objection failed; but it does not clearly appear from the report whether the paper was admitted as evidence, or whether the decision was that it did not exclude oral evidence. In the case of *Ramsbottom* v. *Wortley*, ib. 445, the circumstances were the same, except that the memorandum was signed by the auctioneer, but did not contain the lessor's name, and was therefore not binding within the Statute of Frauds. Per *Dampier*, J.: "This may not be such a memorandum of the contract as would satisfy the

Statute of Frauds, but it is such a memorandum of the agreement as requires a stamp. It is not evidence of the entire contract, but it is a memorandum signed by the agent of one of the parties, and surely that is evidence of the contract." See also *Stevens* v. *Pinney*, 2 J. B. Moore, 349; *Brewer* v. *Palmer*, 3 Esp. 213; *Drant* v. *Brown*, 2 Dowl. & Ry. 582; *S. C.*, 3 B. & Cr. 665; *Doe* d. *Brigham* v. *Cartwright*, 3 B. & Al. 326; *Hawkins* v. *Warre*, 5 Dowl. & Ry. 512; *S. C.*, 3 B. & Cr. 690. **Stamps on Agreements.**

In *Vaughton* v. *Brine*, 1 Scott, N. R. 258, which was an action against a company for salary due to the plaintiff for services as a clerk, the plaintiff produced in evidence an unstamped resolution of the company for employing him at a certain salary, which was admitted. See *Lucas* v. *Beach*, Ib. 350. **Resolution entered in the books of a company.**

Where a notice of dissolution of partnership was produced to prove that a partnership had subsisted, Lord *Ellenborough*, C. J., in answer to an objection for want of stamp, said: "a stamp is necessary where the instrument is used directly as an agreement, but not where it is introduced merely incidentally; otherwise it would be necessary to stamp all papers. This was only used as evidence of an acknowledgment by the defendants of a partnership having subsisted between them:" *Wheldon* v. *Matthews*, 2 Chitty, 399. See *Frazer* v. *Bunn*, 8 Car. & P. 704. And a title which arises out of a state of facts, independently of any express contract which is reduced to writing, may be proved independently of the writing. See *Rambert* v. *Cohen*, 4 Esp. 213; *Manley* v. *Peel*, 5 Esp. 121; *Haigh* v. *Brooks*, 3 Per. & D. 452.

An unstamped instrument is capable of being made available by stamping (Stamp Act, 1870, s. 15), and therefore has value, and may be recovered in trover: *Scott* v. *Jones*, 4 Taunt. 865. **Unstamped agreement recognised for some purposes.**

An unstamped instrument may be looked at to show fraud or illegality: *Gregory* v. *Fraser*, 3 Camp. 454; *Keable* v. *Payne*, 3 Nev. & P. 531; *Coppock* v. *Bower*, 4 M. & W. 361; *Holme* v. *Sixsmith*, 7 Ex. 802; *S. C.*, 21 L. J., Ex. 313; or forgery: *Rex* v. *Castle Morton*, 3 B. & Al. 589. As to when an un- **Proof of fraud, &c.**

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stamped instrument is inadmissible in criminal cases, see 3 Stark. Ev. 1382; *Keable* v. *Payne*, 3 Nev. & P. 531.

Proposal, or prospectus, &c.

An unstamped estimate and proposal for building, which was not finally acceded to, was allowed to be read for the purpose of reducing the plaintiff's claim according to his own estimate: *Penniford* v. *Hamilton*, 2 Stark. 475. So a printed prospectus, by which the plaintiff offered his services on certain terms, was allowed to be read in an action upon a parol contract entered into with reference to those terms: *Edgar* v. *Blick*, 1 Stark. 464. See also *Clay* v. *Crofts*, 20 L. J., Ex. 361.

Writings held not to amount to agreements.

It is clear, however, that a writing which neither amounts to an agreement, nor is offered as evidence of an agreement, properly so called, that is to say, a promise founded on a consideration, does not require an agreement stamp. Thus in an action for not returning bills, the following memorandum, signed by the defendant, was admitted, though unstamped:—

Acknowledgment.

"I have in my hands three bills, which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, *or* return on demand." It was a mere acknowledgment, and created no other contract than that which the law implied: if the defendant had bound himself to get the bills discounted, it would have been different: *Mullett* v. *Hutchinson*, 1 Man. & Ry. 522; 7 B. & Cr. 639; *Langdon* v. *Wilson*, 2 Man. & Ry. 10; 7 B. & Cr. 640. So a bought note of shares in a company, sent by a broker to his principal, was admitted to prove that the defendant (the broker) had made a certain representation to the plaintiff (the purchaser) as to the sum paid on the shares: *Tomkins* v. *Savory*, 4 Man. & Ry. 538; 9 B. & Cr. 704. So no stamp is required upon an authority by a surety, to give time to the debtor; *Hill* v. *Johnson*, 3 Car. & P. 456; or an authority to sell goods and appropriate the proceeds; *Humphreys* v. *Briant*, 4 Car. & P. 157; to pay money simply; *Parker* v. *Dubois*, 7 Car. & P. 406; 1 M. & W. 30; *Hutchinson* v. *Heyworth*, 1 Per. & D. 266; *S. C.*, 9 A. & E. 375; or an acknowledgment of having received money by a bill for a particular

purpose, "which when paid would exonerate the party paying" (being on a receipt stamp); *Watkins* v. *Hewlett*, 3 J. B. Moore, 211; 1 Br. & B. 1; or a memorandum of approval of a draft, indorsed on it; *Doe* d. *Lambourn* v. *Pedgriph*, 4 Car. & P. 312; or a cognovit, unless it contains terms varying the rights of the parties, as a provision for payment by instalments, &c.; *Ames* v. *Hill*, 2 Bos. & P. 150; *Reardon* v. *Swaby*, 4 East, 188; or a notice of dissolution of partnership; *Jenkins* v. *Blizard*, 1 Stark. 418, unless it contains an agreement to dissolve, and is signed; *May* v. *Smith*, 1 Esp. 283 (but the cases seem scarcely distinguishable); or an I O U; *Israel* v. *Israel*, 1 Camp. 499; see *Jones* v. *Ryder*, 4 M. & W. 32; *Melonotte* v. *Teasdale*, 13 L. J., Ex. 358; *Hynes* v. *Dewdney*, 21 L. J., Q. B. 278; unless it contains terms varying the liability implied by such an acknowledgment; as, that part of the debt shall be reduced in a certain event, or that payment shall not be demanded before a certain day, &c.; *Evans* v. *Phillpott*, 9 Car. & P. 270; *Brooks* v. *Elkins*, 2 Mee. & W. 74. See *Green* v. *Davies*, 4 B. & C. 235; *S. C.*, 6 Dowl. & Ry. 306; *Ashby* v. *Ashby*, 3 Moo. & P. 186; *Wheatley* v. *Williams*, 1 M. & W. 533; *Shrivel* v. *Payne*, 8 B. & C. 471; or an attornment, unless it contains terms; *Cornish* v. *Searell*, 1 Man. & Ry. 703; 8 B. & Cr. 471; *Doe* d. *Linsey* v. *Edwards*, 6 Nev. & M. 633; 5 A. & E. 95; *Doe* d. *Wright* v. *Smith*, 3 Nev. & P. 335; 8 A. & E. 255; *Doe* d. *Frankis* v. *Frankis*, 3 Per. & D. 565; *S. C.*, 11 A. & E. 792; or an acknowledgment of tenancy at sufferance, though couched in the form of an agreement: *Barry* v. *Goodman*, 2 Mee. & W. 768. See *Hiern* v. *Mill*, 13 Ves. 114.

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Cognovit.

Notice.

I O U.

Attornment.

As to what terms inserted in a promissory note or bill of exchange will subject it to an agreement stamp, see *Smith* v. *Nightingale*, 2 Stark. 375; *Nicholson* v. *Smith*, 3 Stark. 128; *Bolton* v. *Dingdale*, 1 Nev. & M. 412; *S. C.*, 4 B. & Ad. 619; *Davies* v. *Wilkinson*, 2 Per. & D. 256; *S. C.*, 10 A. & E. 98; *Horne* v. *Redfearn*, 6 Scott, 260; *S. C.*, 4 Bing. N. C. 433.

Promissory note.

An agreement, the subject-matter of which is not

Value of 5*l*.

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capable of being valued, as, a contract of marriage, requires no stamp as such: *Orford* v. *Cole*, 2 Stark. 351. The value must appear affirmatively, or at least impliedly. See *Rex* v. *Enderby*, 2 B. & Ad. 205; *Wrigley* v. *Smith*, 5 B. & Ad. 117; *S. C.*, 3 Nev. & M. 181; *Feltham* v. *Cartwright*, 7 Scott, 695; *Shepherd* v. *Wheble*, 8 Car. & P. 534.

Sale of goods.

Contract containing collateral stipulations.

A contract for the sale of goods comes within the exemption, although it contains collateral stipulations as to the mode of payment, &c.: *Heron* v. *Granger*, 5 Esp. 269; *Ellis* v. *Ellis*, Gow, 216. So an agreement for the sale of a ship, part of the price to be secured by mortgage of the ship, the vendor to charter the ship, &c.: *Meering* v. *Duke*, 2 M. & Ry. 221. See also *Venning* v. *Leckie*, 13 East, 7; *Whitworth* v. *Crockett*, 2 Stark. 431; and see *Marson* v. *Short*, 2 Scott, 243, where the memorandum contained an agreement that the horse, a share in which was the subject of sale, should be entered to run at certain races.

But an undertaking by a principal to provide for bills drawn upon his factor, if goods then or to be placed in the factor's hands should remain unsold at the maturity of the bills, was held not to relate to the sale of goods as its primary object, so as to fall within the exemption: *Smith* v. *Cator*, 2 B. & Al. 778. But guarantees for the price of goods sold or to be sold may be made without stamp: *Watkins* v. *Vince*, 2 Stark. 368; *Warrington* v. *Furbor*, 6 Esp. 89; 8 East, 242; *Waddington* v. *Bristow*, 2 Bos. & P. 452. See *Curry* v. *Edensor*, 3 T. R. 524.

Goods and goodwill.

A contract for the sale of "two flies at 60*l.*, harness and *goodwill* included," was held to require a stamp. Per *Tindal*, C. J.: "Suppose this had been an agreement for the sale of the plant *and goodwill* of a brewery or distillery, could it be said that the agreement related merely to a sale of goods?" *South* v. *Finch*, 4 Scott, 293.

Goods not in existence; work and labour.

A contract for the sale of goods, whether in existence at the time or not, to be made and delivered in a perfect state by the seller, seems, notwithstanding some former doubts, see *Waddington* v. *Bristow*, 2 Bos. & P. 452; *Boydell* v. *Drummond*, 11 East, 142,

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to fall within the exemption. See *Watts* v. *Friend*, 10 B. & Cr. 446; *Evans* v. *Roberts*, 8 Dowl. & Ry. 611. Thus, in *Wilks* v. *Atkinson*, 6 Taunt. 11, a contract for selling and delivering oil, not yet expressed from seed in the vendor's possession, was held to be within the exemption. See *Ingram* v. *Lee*, 2 Camp. 521. So an unstamped memorandum of a contract for marble chimney-pieces, containing an agreement by the vendor to finish them in a tradesmanlike manner, was admitted: *Hughes* v. *Breeds*, 2 Car. & P. 159. But there it did not appear that the goods did not exist at all at the date of the contract. In another case, however, the goods clearly did not exist at the time in the possession of the vendor, the contract being for the supply of water to a house by a water company; and it was held that no stamp was necessary: *West Middlesex Water Works Company* v. *Suwerkop*, 4 Car. & P. 87. That case seems to fall strictly within the rules as to crops established by the recent cases on the Statute of Frauds, *ante*, pp. 283 *et seq.*

Pinner v. *Arnold.*

In the case of *Pinner* v. *Arnold*, 2 Cr., M. & R. 613, an agreement for the making of a press, to be delivered within three months, was admitted without a stamp. Per *Parke*, B.: "This is nothing more than a contract to *sell* and deliver a copper-plate printing press of the plaintiff's manufacture; if it had appeared that part of the contract was to fix it to the floor or the walls of the defendant's house, I should have doubted whether it was a contract for the sale of goods, within the meaning of the Act; because that would be the same in principle as a contract to erect a pillar. In this case, however, it does not appear to be any part of the contract that it should be so fixed; and its having been put together in the defendant's shop can make no difference in the nature of the contract." In the course of the argument the same learned judge observed: "The distinction is, that if you employ a tailor to make a coat, and deliver it to you, his remedy is for goods sold; but that if you employ him to mend a coat for you, his remedy is for work and labour." See *Atkinson* v. *Bell*, 2 Man. & R. 292; *S. C.*, 10

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B & C. 277. From some other observations which fell from the Court in the course of the argument, it would appear that every contract which would be considered as a sale of goods, &c., within the 17th section of the Statute of Frauds (*vide ante*, p. 274), would fall within the exemption in the Stamp Act.

Collateral matters.

As to the observation in the judgment just cited, that, if part of the contract had been to fix up the press, the writing might have required a stamp, it is to be remarked that the exemption extends to all agreements, &c., "made for *or relating to* the sale of any goods, &c.;" and if the principal subject of the contract appears to have been the sale of goods, a collateral stipulation on a minor point would be considered as merely auxiliary to that, and insufficient to take the case out of the saving: *vide ante*, p. 381, and *Doe* d. *Phillips* v. *Phillips*, 3 Per. & D. 603; *S. C.*, 11 A. & E. 796. Thus, a contract with a bricklayer to erect a brick pillar stuccoed, might be well treated as a contract for work and labour, rather than goods; at the same time that a contract with a sculptor, for the purchase of a marble column or a statue, to be finished on his own premises, and erected by him on the purchaser's, might be treated as a contract for goods to be delivered.

Abandonment of contract for sale of goods.

An agreement for the abandonment of an existing contract for the sale of goods, and for the future sale of goods on different terms, is within the exemption: *Whitworth* v. *Crockett*, 2 Stark. 431.

Horse.

A contract for the sale of a horse, or of a part interest in a horse, requires no stamp: *Marson* v. *Short*, 2 Scott, 248.

Fixtures.

Fixtures, it seems, do not come within the description of goods, wares, or merchandizes; and a contract respecting the sale of them, if it operates as an actual transfer of the interest in the fixture, must be stamped as a conveyance; *Horsfall* v. *Key*, 17 L. J., Ex. 267; otherwise as an agreement; *Wick* v. *Hodgson*, 12 J. B. Moore, 213; 2 Scott, 249. See as to crops, *ante*, p. 283.

Contract under seal for sale of goods.

A contract for the sale of goods contained in a deed, whether as accessory to some other subject or not, renders the instrument liable to a stamp as a

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deed not otherwise charged: *Clayton* v. *Burtenshaw*, 7 Dowl. & Ry. 800; 5 B. & Cr. 41. See *Robinson* v. *Drybrough*, 6 T. R. 317.

As to instruments executed abroad.

No country ever takes notice of the revenue laws of another: per Lord *Mansfield* in *Holman* v. *Johnson*, Cowp. 341, 343. See *Le Cheminant* v. *Pearson*, 4 Taunt. 367; and *Boucher* v. *Lawson*, cas. tem. Hard. 85; and therefore an instrument made abroad is generally admissible in evidence here without a stamp. Thus, in *James* v. *Catherwood*, 3 Dowl. & Ry. 190, unstamped receipts for money were admitted in proof of a loan made in France. *Abbott*, C. J., said: "It would be productive of prodigious inconvenience if in every case in which an instrument was executed in a foreign country we were to receive in evidence what the law of that country was in order to ascertain whether the instrument was or was not valid." See also *Wynne* v. *Jackson*, 2 Russ. 351.

Holman v. *Johnson.*

James v. *Catherwood.*

In *Clegg* v. *Levy*, 3 Camp. 166 (A.D. 1812), an unstamped agreement executed at Surinam was allowed to be read, on the ground that the objecting party did not sufficiently prove that a stamp was required by the law of the place. Lord *Ellenborough* said: "A contract must be available by the law of the place where it is entered into, or it is void all the world over." So, in *Alves* v. *Hodgson*, 7 T. R. 241, a written contract not duly stamped according to the law of Jamaica was rejected by Lord *Kenyon*, C. J., who observed: "It is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and, unless it be good there, it is not obligatory here."

Clegg v. *Levy.*

Alves v. *Hodgson.*

In *Bristow* v. *Sequeville*, 5 Ex. 275, *Rolfe*, B., said: "The marginal note in *Alves* v. *Hodgson* is perfectly correct, although I cannot help thinking that there must be some mistake in the report of the case. I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here. But if that case meant to decide that where a stamp is required by the revenue laws of a foreign state before a document can be received in evidence there,

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it is inadmissible in this country, I entirely disagree."

Instruments executed abroad.

If the doctrine of *James* v. *Catherwood* be correct, contracts and other instruments executed in a foreign country, so far as they confer or are used as evidence in enforcing rights of a personal nature against the party executing them abroad, although relating to real property in England, seem to require no stamp at all: but a deed of *conveyance* of real estate in England would probably be held to be subject to the English stamp laws wherever it might be executed; for such instrument could never have been enforceable, or have had any validity or effect as a conveyance, in a foreign Court.

Conveyance of lands.

But the doctrine of *James* v. *Catherwood* has had much doubt cast upon it by *Bristow* v. *Sequeville*, *ubi supra*, as well as by the text writers. See Storey, sects. 260, 318; Westlake, sect. 198. And there seems to be great force in the objection, where, by the law of the place, the instrument is incurably void, unless stamped previously to execution; but if the law allows the stamp to be affixed after execution, then it is a mere rule of evidence, or *lex fori*, and can no more be taken notice of in a foreign court than a law of limitation, which bars the remedy merely, and not the right. See *Don* v. *Lippman*, 5 Cl. & Fin. 1. Yet, when it is considered that even a law which absolutely avoids a contract for want of a stamp is a mere fiscal penalty, and quite collateral to the making of the contract as between the parties, it may be doubted whether the rule which refers the validity of a contract to the law of the place where it was made, can properly be extended to such a law as that.

Instruments for use abroad.

Instruments executed in England, although intended to be acted upon abroad, must bear an English stamp. See *Stonelake* v. *Babb*, 5 Burr. 2673.

Instruments executed abroad.

Instruments executed out of England are, at all events, sufficiently stamped with the stamp required by the law of the place of execution: *Snaith* v. *Mingay*, 1 Mau. & S. 87; *Jordaine* v. *Lashbrooke*, 7 T. R. 601; *Holdsworth* v. *Hunter*, 10 B. & Cr. 449; 5 Man. & Ry. 393. But a statement of the

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place of execution on the face of the instrument does not exclude parol evidence that it was, in fact, executed elsewhere: *Jordaine* v. *Lashbrooke: Ex parte Manners*, 1 Rose, 68. In *Ximenes* v. *Jacques*, 1 Espin. 311, an agreement, purporting to have been executed at sea, was received without a stamp. See *Winbled* v. *Malmberg*, 1 Esp. 454.

Deed cannot be used in a second transaction between the same parties, without being re-stamped.

Of course, a deed which has once performed its office, cannot be used in a second transaction to which the terms of it may happen to apply. Thus, in the case of *Hammond* v. *Foster*, 5 T. R. 635, where A. granted a redeemable annuity to B., which he redeemed, paying over the redemption-money to B.'s attorney, from whom he received the annuity deeds cancelled. A. afterwards applied to the attorney to procure him more money, who informed him that he had not paid over to his client the money he had received for redeeming the annuity, and that he would re-deliver to A. that sum on receiving back the deeds. This was done, and one of the grounds for an application to the Court for setting aside the annuity was, that it was an entirely new transaction, and that there ought to have been new stamps on the deeds; and of this opinion was the Court.

Deed cannot be added to, after execution, without a fresh stamp.

Where a material addition has been made to a deed after all the circumstances essential to its operation are complete, this additional matter requires to be stamped as a separate instrument, whether it is written upon the same piece of parchment or not: *Schumann* v. *Weatherhead*, 1 East, 537; *Bacon* v. *Simpson*, 3 M. & W. 78; *Stevens* v. *Lowe*, 2 M. & Sc. 44. But see *Taylor* v. *Parry*, 1 Scott, N. R. 576. On the same principle, it is clear that an alteration cannot be made in a bill of exchange, after it is issued, without a fresh stamp: *Knill* v. *Williams*, 10 East, 431; *Bathe* v. *Taylor*, 15 East, 412; *Downs* v. *Richardson*, 5 B. & Al. 674; *Bowman* v. *Nicholl*, 5 T. R. 537. See *Spicer* v. *Burgess*, 1 Cr., M. & R. 129; *Byron* v. *Thompson*, 3 Per. & D. 71; *S. C.*, 11 A. & E. 31; *Knight* v. *Clements*, 3 Nev. & P. 375; *S. C.*, 8 A. & E. 215; *Atten* v. *Farren*, 5 Car. & P. 513.

Alterations.

Correction of a mistake,

But it is clear that an alteration made in a deed,

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by merely correcting the mis-statement of a fact, and not arising from any change of intention in the parties, and more especially if the instrument were previously incapable of legal operation, does not, nor does the re-execution of the deed consequent on such alteration, subject it to a fresh stamp; and therefore, where, after the execution of a bill of sale of a ship, it was discovered that the certificate of registry was mis-recited, whereupon the error was rectified and the deed was re-executed, but without any new stamp, an objection to its admissibility in evidence on this account was overruled: *Cole* v. *Parkin*, 12 East, 471.

which was essential to the operation of the deed, does not subject it to a fresh stamp.

Error in fact allowed to be corrected.

And the same rule was followed in another instance where the alteration was merely designed to correct an error, and did not spring from altered intention, though the error was not, as in the last case, of a nature wholly to prevent the deed from taking effect. Thus, in the case of *Robinson* v. *Touray*, 1 Mau. & Sel. 215, it was held, that a mistake in a policy of insurance made by the agent, in declaring the interest in the margin of the policy to be on a ship by a wrong name, might be rectified, by inserting the true name, without a fresh stamp: *Sanderson* v. *Symons*, 4 J. B. Moore, 42.

Alteration in amount.

In *Robson* v. *Hall*, Peake, 128, a memorandum of a wager with an indorsement made after execution, doubling the amount of the bet, was held by Lord *Kenyon* to require two stamps. That case, however, proceeded on the ground that there were two distinct bets, and the paper was received in evidence as to the first bet. But generally an alteration in the terms of an agreement puts an end to the old agreement; and although not stamped, may be looked at to show that the old agreement is at an end, whether it is made by an indorsement or by a separate writing, on the same principle that an unstamped writing may be looked at to exclude parol evidence of the matter to which it relates: *Reed* v. *Deere*, 2 Car. & P. 624; *S. C.*, 7 B. & Cr. 261; *Sweeting* v. *Halse*, 4 Man. & Ry. 287; 9 B. & Cr. 365.

Unstamped variation looked at for some purposes.

Alteration of deed, while *in*

It is clear, that an alteration made in a deed

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while it was *in fieri*, having been executed by some only of the parties to it, does not subject it to an additional stamp. Thus in the case of *Matson* v. *Booth*, 5 Mau. & Sel. 223, where it appeared that, after a bailbond had been executed by some of the bail, but before the bond had been accepted by the sheriff, the name of another obligor, with the concurrence of those who had executed it, was added; it was held that the bond was not rendered void by this alteration, and that no additional stamp was necessary; for never having been out of the hands of the obligors, the bond was to be considered, at the time of the addition, as in the nature of an escrow. So in *Lyburn* v. *Warrington*, 1 Stark. 162, an indorsement made on a deed after signature, but before the sealing and delivery, was admitted without a new stamp; and the insertion of the name of a second witness after execution, but before delivery to either witness, was held good. So, an alteration in a bankrupt's certificate before allowance: *Ex parte Sawyer*, 17 Ves. 244.

fieri, does not subject it to a fresh stamp.

The subject of escrows is fully treated of under the title Attestation, *infra*, and therefore it will be sufficient to observe here, that the ancient doctrine has been much relaxed by modern decisions: and it is now established, that, even if an instrument be executed as the *deed* of the party, and not in terms as an escrow, yet, if it be accompanied by an understanding or agreement for postponing its operation until some future event or period, this will constitute it an escrow. See *Johnson* v. *Baker*, 4 B. & Al. 410; *Murray* v. *Earl of Stair*, 2 B. & Cr. 82; 2 D. & Ry. 278; *Matson* v. *Booth*, 5 Mau. & S. 223; *Hudson* v. *Revett*, 5 Bing. 368, stated in *Spicer* v. *Burgess*, 1 Cr., M. & R. 129; *Watkins* v. *Nash*, L. R., 20 Eq. 262. Upon the same principle of liberality greater scope has been given than formerly to alterations made subsequently to the execution of the instrument, where they had been made with the privity of the parties interested, and without any fraudulent intention; and such alterations have been held not to affect the validity of the instrument in instances where

As to escrows.

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according to the old doctrine they would certainly have had that effect: *Waugh* v. *Russell*, 1 Marsh. 311; *Coke* v. *Brummel*, 2 J. B. Moore, 495; *Worral* v. *Jacob*, 3 Mer. 756; *Hudson* v. *Revett*, 5 Bing. 368; *Collins* v. *Prosser*, 1 B. & Cr. 682; 3 D. & R. 112; *Hall* v. *Chandless*, 12 J. B. Moore, 316; but see *Adams* v. *Bateson*, 3 Moo. & Pay. 339.

Alteration after execution by *some* of the parties.

In these cases no question was raised as to the sufficiency of the stamp, with the exception indeed of *Hall* v. *Chandless*, which seems to have decided that an alteration made in a deed after its execution by some of the parties, who were not the principal agents in the transaction, being merely passive or concurring parties, *and were not interested in the alteration*, did not subject it to a fresh stamp. See *Knight* v. *Crockford*, 1 Esp. 190; *Jones* v. *Jones*, 1 Cr. & M. 721.

Several distinct transactions cannot be included in one stamp.

By sect. 8 of the Stamp Act, 1870—

"Except where express provision to the contrary is made by this or any other Act, an instrument containing or relating to several distinct matters is to be separately and distinctly charged as if it were a separate instrument, with duty in respect of each of such matters."

So, if A. owes B. a sum of money, and C. owes D. a sum of money, B. and D. could not take from their respective debtors a bond for the payment of their several debts by one instrument having only a single stamp, though the stamp were sufficient to cover a bond for the aggregate sum; and even if the obligee or the obligor were the same person, that is, if two creditors, owing distinct independent debts, bind themselves to their common debtor (but not one for the other), or one debtor, owing to two different persons two distinct independent debts, becomes bound to his several creditors, by the same instrument, for the payment of the requisite debts, it must bear a separate stamp for each obligation, there being no community of interest or purpose between the respective parties. Again, though it is clear that the legatees under a will may join in releasing the executor, in a deed bearing one stamp

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only, yet, if a person were executor under several wills, it is apprehended that the legatees under all the wills could not join in one deed of release, without subjecting the deed to a number of stamps equal to the number of wills. The distinction on this subject is thus stated in Phillips on Evidence, vol. 1, p. 490, 6th ed., in a passage which is often cited: "If the interest of the parties relates to one thing, which is the subject-matter of the instrument, or, in other words, if the instrument affects the separate interests of several, and there is a community of the same subject-matter as to all the parties, there a single stamp will be sufficient; but where the parties have separate interests in several subject-matters, there ought to be a separate stamp for each party."

Assignment of shares in a common fund held to require one stamp only.

The first branch of this proposition may be illustrated by numerous cases. Thus, in the case of *Baker* v. *Jardine*, cited 13 East, 235, it was held that a bill of sale by several mariners, part of the crew of a privateer, of their respective shares of prize-money, did not require more than one stamp. So, in the case of *Davis* v. *Williams*, 13 East, 232, an agreement by several for a subscription to one common fund, viz., for making a wet dock at Bristol, though several as to each subscriber, was held to be admissible in evidence with a single stamp.

Goodson v. *Forbes.*

The principle of these cases was recognised and acted on in the case of *Goodson* v. *Forbes*, 6 Taunt. 171; 1 Marsh. 524, where, in an action brought on a policy of insurance, the question was raised, whether an agreement for a reference, made between the assured (the plaintiff), on the one part, and all the underwriters who had subscribed the policy, on the other part, and the award made under that reference, were sufficiently stamped with a single stamp. It was contended, that these instruments required as many stamps as there were underwriters, being a distinct agreement and award as to each; but the Court held, that there was such a community of interest as to render one stamp sufficient.

Power of attorney by

So, in the case of *Allen* v. *Morrison*, 8 B. & Cr. 565;

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the members of a mutual insurance club held to require but one stamp.

Allen v. *Morrison.*

3 Man. & R. 70, where all the members of a mutual insurance club executed a power of attorney appointing certain persons their attornies to execute policies of the ships admitted into the club, by virtue of which they signed each policy with the names of all the members except the owner of the ship, it was contended, that as it was a several power given by each member of the club, there ought to have been a separate stamp for each; but the Court overruled the objection.

As to stamp on indenture of apprenticeship.

In coincidence with the principle of the preceding cases, it has been held that an indenture by which an apprentice was bound for seven years to serve A. B. for the first four years, and his own father for the last three, to learn two different trades, required one stamp only, the whole being one transaction: *The King* v. *Inhabitants of Louth*, 8 B. & Cr. 247; 2 Man. & R. 273.

One stamp on several bond, with same condition, held to be sufficient.

Bowen v. *Ashley.*

Of course a several bond with one condition, applicable to all the obligors, is only liable to one stamp. Thus, in the case of *Bowen* v. *Ashley*, 1 B. & P., N. R. 274; see also 6 Taunt. 171, where a bond was executed by six persons, binding themselves *severally*, and their several heirs, &c., in a penalty, conditioned for the regular attendance of the obligors at a certain musical society, each being bound for the attendance of the others as well as himself, it was contended that the instrument ought to have borne six bond stamps; but the contrary was decided. Sir *James Mansfield*, C. J., said: "This was one transaction; it was not intended that one of these musicians should be bound unless all were bound; the engagement would never have been made with one of them that he should perform by himself singly; but the binding of all of them to the same object was the consideration of the obligation entered into by each singly. We, therefore, think that only one stamp was necessary. It does not follow from this determination that persons may defraud the revenue by putting several bonds into one instrument and with one stamp, as was stated in the argument. If that were to be done, and the persons who signed such bonds were severally bound

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it would be a fraud; but here is no fraud." So an agreement by three persons, that in consideration of A.'s discharging a debt due from B. to C., amounting to 200*l.*, with the costs, each of them would severally pay 50*l.* and one-fourth of the costs, and give a bond, bill, or note for his proportion in the meantime, was held to require but one stamp: *Ramsbottom* v. *Davis*, 4 Mee. & W. 584.

Covenant to indemnify surety may be contained in same deed as the covenant of both.

It seems that where two obligors execute a bond, one as principal and the other as surety, to a third person, and the principal by the same deed obliges himself to indemnify the surety against the consequences of this obligation, the whole may be included under one stamp: *Annandale* v. *Pattison*, 9 B. & Cr. 919.

Result of the cases.

The general result of the cases, therefore, seems to be in favour of the exemption of the instrument from a plurality of stamps, where its various objects may fairly be considered as parts of the same transaction. They certainly do not afford a criterion exactly applicable to many instances that might be suggested, in which it would be extremely difficult to say whether there was such "community of purpose" as to bring the transaction within the allowed compass of a single stamp. It is probable that the Courts, in forming their judgment of any particular case, would be much influenced by the consideration whether it was consistent with convenience and the usual course of business that the transaction should be comprised in one deed, and it would not be safe to consider the preceding cases as authorizing any conclusion at variance with either.

Several matters.

Where a mercantile arrangement was proposed and accepted by letters passing between the plaintiff and the defendant's son, and the defendant afterwards entered into a guarantee on behalf of his son by indorsement on the son's letter, it was held to amount to one transaction within the proviso as to letters: *Stead* v. *Liddiard*, 1 Bing. 196; 8 J. B. Moore, 2.

Shipton v. Thornton.

In the case of *Shipton* v. *Thornton*, 9 A. & E. 314; *S. C.*, 1 Per. & D. 216, a cargo of goods, part of which belonged solely to T., and part to T. and W.,

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as partners, being in the hands of the consignee, T., on application for both parcels, signed an undertaking in the name of T. and W. to pay freight for them, commencing, "I hereby engage to pay," and the goods were delivered to him. The agreement was admitted with a single stamp in an action against T. for the freight, on his own parcel; because, though he could not bind his partner, he made himself liable for the whole, so that the contract was entire.

Agreement for letting farms requires a separate stamp for each demise.

Of course, where a landed proprietor enters into a general agreement with his tenantry for the letting of their respective farms, the terms of letting, except with regard to rent, being the same as to all, and the tenants' names are arranged in columns, with the respective rents set opposite to their names, the instrument operating as a separate demise or letting as to each tenant, requires a separate stamp for each; for the circumstance of the several agreements being contained on one piece of paper instead of many, cannot vary the construction or the stamp: *Doe* d. *Copley* v. *Day*, 13 East, 241. Indeed, no attempt was made to deny the liability of the instrument to several stamps in this case; the only question being, whether a single stamp, which had been affixed to the instrument, could be connected with the contract with the tenant against whom the action was brought, and near whose name it was placed, so as to render the instrument admissible as evidence of such contract; and the Court was of opinion, that, as the stamp had been recently impressed, and there appeared to be no dispute with any other tenant, it might be so considered. The obvious alternative rule in such cases, and which would prevail in the absence of evidence appropriating the stamp to any one particular transaction, would be to consider the stamp as applicable to the person *first* named; for, in a case where several persons have been admitted to the freedom of a corporation upon one stamp, the admission of the person first named was held to be good, and that of all the rest to be void. See *Powell* v. *Edmunds*, 12 East, 6, where a paper containing two agreements and one stamp was admitted to

Appropriation of stamp to particular transaction.

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prove the agreement to which it appeared that the stamp related. If it is uncertain to which contract the stamp relates, neither will be admitted. See *Waddington* v. *Francis*, 5 Esp. 182.

In *Doe* d. *Phillips* v. *Phillips*, 11 A. & E. 796; *S. C.*, 3 Per. & D. 603, a deed of surrender of a lease, and of a new lease of the premises at an increased rent, was held to require only one stamp, although it was contended that the contract for the new lease was a distinct matter from the surrender. See *Doe* d. *Wheeler* v. *Wheeler*, 4 Nev. & M. 10.

Loss of unstamped agreement.

If an unstamped agreement has been lost, no parol evidence can be given of its contents, for it is impossible to say whether the commissioners of stamps, in the exercise of their discretion, would have permitted the writing to be stamped on payment of the penalty: *Rippiner* v. *Wright*, 2 B. & Al. 478; *Rex* v. *Castle Morton*, 3 id. 588.

Presumption as to lost documents.

"If an instrument is lost, and if there should be no evidence given respecting it one way or the other, the presumption which ought always to be made, and which always would be made, by the Court, would be that the instrument was perfectly stamped;" see Lord *Cairns* in *Marine Investment Co.* v. *Haviside*, L. R., 5 H. L. at p. 631; but if it is proved that the instrument was unstamped at the time of and subsequently to its execution, the *onus probandi* is shifted, and the party who relies on the instrument must show that it was duly stamped: *ibid.* See also Taylor on Evidence, 7th ed. p. 161; and see *Hart* v. *Hart*, 1 Ha. 1; *Crowther* v. *Solomons*, 6 C. B. 758; *Pooley* v. *Goodwin*, 4 Ad. & E. 94; *Rex* v. *Long Buckby*, 7 East, 45; *Clasmadewe* v. *Carrel*, 18 C. B. 36.

PRECEDENTS (*a*).

I.—*AGREEMENT for the* SALE *of* FREEHOLDS *with the usual stipulations* (*b*).

Parties.

AN AGREEMENT made the ——— day of ———, 18—, BETWEEN [*vendor*], of &c. (hereinafter referred to as the vendor), of the one part, and [*purchaser*], of &c. (hereinafter referred to as the purchaser), of the other part, WHEREBY it is agreed as follows, that is to say:—

Agreement for sale and purchase.

Parcels.

1. The vendor shall sell, and the purchaser shall purchase, for the sum of £———, All that freehold piece or parcel of land containing by admeasurement ——— acres, ——— roods, ——— perches, or thereabouts, situate in the parish of ——— in the county of ———, formerly in the occupation of A. B., and now of C. D., and bounded on the north by land of E. F., and on the east by the high road from X. to Y., and on the south &c., and which said premises hereby agreed to be sold are described and delineated in the apportionment of tithe rent-charge for the parish of ——— aforesaid, and in the map therein referred to, and therein respectively numbered ———, and the inheritance fee-simple of and

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Arrangement of precedents.

(*a*) The following Precedents of Agreements, numbered from I. to XXVI., relate for the most part to dealings with land and interests in land; the remaining precedents relate to miscellaneous transactions, and are arranged, as far as possible, alphabetically under headings denoting the subject-matter of each agreement.

Sale of land.

(*b*) The law relating to conditions of sale of land will be treated of in a connected form under the title, CONDITIONS OF SALE; see also ABSTRACTS, *ante*, pp. 52 *et seq.* The precedents under the title, CONDITIONS OF SALE, will furnish forms of stipulations which may be adopted in private agreements, according to the circumstances of the particular transaction. In this precedent the obligations and rights of the parties as regards title, evidence of title, and production of documents are left to be regulated and determined by the provisions of the Vendor and Purchaser Act, 1874, and of the Conveyancing Act, 1881; for special stipulations on these points, *vide infra*, PRECEDENT, II.

in the same premises in possession, free from incumbrances (*c*).

Delivery of abstract.

2. The vendor shall within ——— days from the date thereof, at his own expense, deliver to the solicitor of the purchaser an abstract of his title to the premises.

Delivery of requisitions.

3. The purchaser shall make in writing and deliver to the solicitor of the vendor his objections and requisitions (if any), to the title shown by the abstract within ——— days after

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(*c*) If there are any incumbrances affecting the property, add:—

Schedule of incumbrances.

"except such as are mentioned in the schedule hereto annexed."

Fee farm rent.

or "a fee farm rent payable to the lord of the manor of ——— out of the said premises only excepted."

Mortgage.

or "a mortgage of the said premises by indenture dated the ——— day of 18—, and expressed to be made between [*parties*] for securing the payment of the sum of £——— and interest only excepted: And which sum of £——— and the interest thereon from the ——— day of ——— now next it is hereby agreed shall be paid and discharged by the purchaser, who shall indemnify the vendor therefrom;"

Annuity.

or "except an annuity, or rent-charge, of £——— payable to ——— for his life, out of the said premises, and secured by indenture dated, &c., and made, &c., and the term, estate and interest thereby created only excepted; And which annuity (or rent-charge), from, &c." (*as above*).

Leases.

or "other than and except such leases for twenty-one or any lesser number of years, as the vendor has already granted of the said premises, or any part thereof, at full improved rents reserved, to be payable yearly or oftener, during the continuance of the estates granted by the same leases respectively [*or* "other than and except the leases or agreements in writing for leases of the present tenants or occupiers of the said premises,"] the counter-parts or copies whereof respectively have been produced to the solicitor of the purchaser, and of the contents of which the purchaser shall accordingly be deemed to have notice."

A purchaser is not bound to ascertain from the tenant the terms of his tenancy: *Caballero* v. *Henty*, L. R., 9 Ch. 447, *ante*, p. 94.

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delivery thereof; And all objections and requisitions which shall not be made and sent as aforesaid within the time specified, shall be deemed to have been waived [and for this purpose time shall be of the essence of the contract].

Requisitions insisted on may entitle vendor to rescind (*d*).

4. In case the purchaser shall make any objection to, or requisition on the title, which the vendor shall from any cause, or on any grounds whatever, be unable or unwilling to answer or comply with, the vendor shall be at liberty (notwithstanding any attempt to answer or comply with such objection or requisition, or any previous or pending negotiation or litigation), at any time to rescind the sale. In that event the vendor shall return the deposit, but the purchaser shall not be entitled to any interest, costs, or compensation, or other payment whatsoever.

Errors, &c. not to annul sale, but to be subject of compensation.

5. The admeasurements and descriptions of the property are believed, and shall be assumed, to be correct. If any misstatement, error or omission (not relating to such admeasurements and descriptions), shall be discovered affecting the nature or value of the premises, the same shall not annul the sale, but if it shall have been pointed out before the completion of the purchase (*e*), and not otherwise, compensation

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(*d*) See as to this stipulation, *Hoy* v. *Smythies*, 22 Beav. 510; *Hudson* v. *Temple*, 29 Beav. 536; *S. C.*, 30 L. J., N. S. 251; *Duddell* v. *Simpson*, L. R., 2 Ch. 102; *Gray* v. *Fowler*, L. R., 8 Ex. 249; *Mawson* v. *Fletcher*, L. R., 6 Ch. 91; *Powell* v. *Powell*, L. R., 19 Eq. 422; *Bowman* v. *Hyland*, 8 Ch. D. 588; *Re Jackson and Oakshott*, 14 Ch. D. 851. These and other cases will be fully considered in a subsequent volume of this work, *sub.* tit. Conditions of Sale.

(*e*) On the question as to whether, in the absence of express stipulation, compensation can be claimed after completion of the purchase, there is some conflict of decision. *Malins*, V.-C., decided that it could not be so claimed in the absence of fraud: *Manson* v. *Thacker*, 7 Ch. D. 620; *Besley* v. *Besley*, 9 Ch. D. 103; *Allen* v. *Richardson*, 13 Ch. D. 524. But *Jessel*, M. R., expressly refused to adopt this view in *Re Turner and Skelton*, 13 Ch. D. 130. In the later case of *Brett* v. *Clowser*, 5 C. P. D. 376, *Denman*, J., cited with approval, and followed the decisions of the learned Vice-Chancellor. And in the recent case of *Joliffe* v. *Baker*, 11 Q. B. D. 255, *Watkin-Williams*, J., who delivered the judgment of the Court, after elaborately reviewing the decided cases bearing on the subject, said, at p. 269: "After the purchaser has taken a conveyance, and the purchase-money has been paid, no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless

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on account thereof shall be allowed or given by the vendor or purchaser, as the case may require, such compensation to be settled (in case of difference), by two referees or an umpire in manner following, that is to say: within —— days after notice of the mis-statement, error or omission, shall have been given, the vendor shall appoint one referee by writing, and the purchaser shall appoint another referee in like manner, and the referees so appointed shall, before they commence their reference, appoint an umpire in writing; and the decision of such two referees as aforesaid, if they agree, and of such umpire as aforesaid, if they disagree, shall be final: PROVIDED ALWAYS, that if either the vendor or the purchaser shall neglect or refuse to appoint a referee within the time specified, the referee appointed by the other party or parties shall make a final decision alone.

Completion of purchase and conveyance of the property (*f*).

6. The purchaser shall on the ——— day of ———, 18—, pay the purchase-money at the office of the solicitors of the vendor, in ——— street, and the purchase shall be then and there completed, and thereupon the vendor and all other necessary parties (if any) will on the said ——— day of ———, make and execute a proper conveyance of the premises to the purchaser. Such conveyance shall be prepared by and at the expense of the purchaser, and shall be left not less than —— days before the said ——— day of ———, for the approval of the solicitors of the vendor at their said office.

Vendor to retain muniments of title

7. The vendor shall retain all deeds and other documents which relate as well to other property as to the property

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such error amount to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised on the purchaser." See also Sugd. Vend. 235, 251; Dart, V. & P. 736. The question being thus far from settled, it is well to place it beyond doubt by express stipulation, as in the text.

(*f*) By the Conveyancing and Law of Property Act, 1881, sect. 4, it is enacted that:—

Completion of contract after death.

(1.) "Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract."

(2.) "A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition, or as heir or next of kin of a testator or intestate."

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agreed to be sold, and shall give to the purchaser a statutory acknowledgment of the right of the purchaser to production of such deeds and documents, and to delivery of copies thereof, and also a statutory undertaking for the safe custody thereof.

relating to other property.

Receipt of rents and discharge of outgoings.

8. The rents [*or* possession (*g*)] of the premises shall be received [*or* retained (*g*)], and all rates, taxes, and outgoings, payable for or in respect thereof, shall be paid by the vendor up to the said ——— day of ———, and as from that date the rents [possession] shall be taken by the purchaser, who shall thenceforth pay all the rents, taxes, and outgoings; and such rates, taxes, and outgoings shall, if necessary, for the purpose of this stipulation be apportioned.

If purchase not completed on day appointed, purchaser to pay interest (*h*).

9. If from any cause whatever the purchase shall not be completed before the said ——— day of ———, the purchaser shall as from that day pay interest for the said purchase-

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(*g*) The words in brackets will be used where the property is in the vendor's own occupation.

If abstract should not be delivered and title declared within a stated time, agreement to be void.

(*h*) The following clause may be inserted where completion by a stated time is material:—

If the vendor should not deliver an abstract of his title as hereinbefore is mentioned before the expiration of ——— days from the date hereof, or should not deduce a good and marketable title to the said messuage and premises before the said ——— day of ———, then and in either of the said cases immediately after the expiration of the said ——— days, or on the said ——— day of ———, this present agreement shall at the option of the purchaser be void to all intents whatsoever, and time shall for this purpose be of the essence of the contract.

Time the essence of contract.

So also time may, if desired, be made of the essence of the contract, in case the purchase-money be not paid at the date appointed; but of course clauses making agreements void if a title be not made, or if the purchase-money paid by a stated time, should never be inserted, unless it be the *express intention* of the parties. See further, as to time being of the essence of the contract, *post, sub.* tit. Conditions of Sale.

It is now settled, after much question, that, if it clearly appears to be the intention of the parties to an agreement that time shall be deemed of the essence of the contract, it must be so considered in equity: Sugd. Vend. 268.

It is well established that the stipulation that the purchaser shall pay interest if the purchase is not completed by a fixed day

money to the purchaser, after the rate of £——— per cent. per annum, until completion of the purchase.

On default of purchaser to comply with stipulations, vendor may rescind and resell (*i*).

10. If the purchaser shall neglect or fail to comply with the above stipulations, the vendor shall be at liberty to rescind the present sale, and resell the property, either by public auction or private contract, at such time and place, and subject to such conditions as the vendor shall think fit, and the deficiency of price, if any, which shall happen on such resale, and on the expenses of and incident to the present sale and resale, shall immediately after the same respectively be made good and be paid to the vendor by the present purchaser, and in case of nonpayment the whole or such part of such deficiency as shall not be paid shall be recoverable by the vendor as liquidated damages. As WITNESS the hands of the parties to these presents.

Witness to the signing of the above-named [*vendor*] and [*purchaser*] [*signature of witness.*] } [*sig. of vendor.*] [*sig. of purchaser.*]

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applies to every delay, except delay caused by wilful obstruction or misconduct of the vendor. See Dart, V. & P. 636, and the cases there cited. And see *post*, tit. CONDITIONS OF SALE.

(*i*) Where there was a stipulation on a sale that on the purchaser's neglect or failure to comply with the conditions, the vendor might resell, and the deposit which had been paid by the purchaser should be forfeited, and that any deficiency in the price on the resale should be made good, it was held that the vendor might retain the deposit, and also recover the expenses of the abortive sale, and the costs of preparing to complete the same, without putting the property up again for sale: *Daniel* v. *Essex*, L. R., 10 C. P. 538.

II.—*AGREEMENT by* Mortgagees *for the* Sale *of* Copyholds (*in a Register County*), Special Stipulations *as to* Commencement *of* Title, *&c.*

Parties.

1. AN AGREEMENT made the ——— day of ———, 18—, Between [*mortgagee*], of &c., and [*mortgagee*], of &c. (who are hereinafter referred to as the vendors) of the one part, and [*purchaser*], of &c. (who is hereinafter referred to as the purchaser] of the other part, Whereby it is agreed as follows, that is to say:—

Agreement to sell and purchase.

1. The vendors shall sell, and the purchaser shall purchase, for the sum of £——— (part whereof, that is to say, £———, shall be paid by way of deposit upon the execution of this agreement, and the residue whereof, that is to say, £———, shall be paid upon the completion of the purchase), All that and those the copyhold messuage or farm-house, and the several closes of land and hereditaments situate in the parish of ———, in the county of ———, formerly in the occupation of A. B. and now of C. D., All which premises are delineated in the map or plan drawn in the margin of this agreement, and are particularly described with their respective admeasurements and abuttals in the schedule hereunder written [*or* hereunto annexed], And the inheritance thereof in customary fee simple according to the custom of the manor of ——— in possession, free from incumbrances, except the quit and other rents, heriots, fines, suits, and services, therefor due and of right accustomed.

Parcels.

Delivery of abstract.

2. The vendors shall within ——— days from the date hereof deliver to the solicitor of the purchaser an abstract of their title to the premises, such title to commence with a surrender of the premises and an admittance thereto of [*surrenderee*] in the year 18—; the earlier title, whether the same appears by recital, covenant for production of deeds, or otherwise, or does not appear at all, shall not be made the subject of any requisition, investigation, or objection (*a*).

Commencement of title.

(*a*) The statutory provision in the Conveyancing, &c. Act, 1881, sect. 3 (for which *vide ante*, p. 53), precluding requisitions and objections to title prior to the commencement named in the contract for sale, does not seem to preclude the purchaser from raising objections founded on grounds outside the contents of the abstract.

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Objections and requisitions.

3. The purchaser shall within ——— days after delivery of the abstract in writing, make and send to the solicitor of the vendors his objections and requisitions (if any) to the title, and shall also within ——— days after the delivery of the vendors' replies to the purchaser's objections and requisitions (if any) in writing, make and send to the solicitor of the vendors his further objections and requisitions (if any) arising out of the vendors' replies: and every objection or requisition, or further objection or further requisition, not so made and sent shall be deemed to have been waived, and for this purpose time shall be of the essence of the contract. The purchaser shall not make any objection or requisition on the ground of the non-registration of any deed or other document.

4. [*Vendors may rescind if requisitions insisted on, ante*, p. 404.]

Expenses of making copies of deeds, &c., whether in vendors' possession or not, to be borne by purchaser.

5. In addition to all expenses by law made payable by a purchaser (*b*), the purchaser shall bear all expenses of and incidental to making, procuring, verifying, furnishing, producing, and examining all attested, stamped, office, or other copies and abstracts of and extracts from Acts of Parliament, inclosure, awards, records, proceedings of Courts, Court rolls, deeds, wills, probates, letters of administration, and other documents, whether in the vendors' possession or not, and which he may require respectively for whatever purpose the same may be required respectively, and of and incidental to all inquiries, searches, and journeys, incident to any of the purposes aforesaid.

Errors in description not to annul sale, nor entitle parties to compensation (*c*).

6. The admeasurements and descriptions of the property, as given in the said schedule, are believed and shall be assumed to be correct; but if any mis-statement, error, or omission shall be found in such admeasurements or descrip-

(*b*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 3 (6), stated *ante*, p. 158.

(*c*) This condition can only be relied upon by a vendor seeking to enforce specific performance, as applying to small errors, and will not cover a material deficiency so as to disentitle a purchaser from compensation: *Whittemore* v. *Whittemore*, L. R., 8 Eq. 603. As to what amounts to material error in description, and as to compensation for such, see *Nicoll* v. *Chambers*, 11 C. B. 996; *Freer* v. *Hesse*, 17 Jur. 177; *Lethbridge* v. *Kirkman*, 2 Jur., N. S. 372; *Cordingley* v. *Cheeseborough*, 8 Jur., N. S. 585; *McQueen* v. *Farquhar*, 11 Ves. 467; *Perkins* v. *Ede*, 16 Beav. 193; *Barnes* v.

II. Sale of Copyholds.

tions, the same shall not annul the sale, nor shall any compensation be allowed, either to the vendor or purchaser in respect thereof.

Completion of purchase.

7. The purchaser shall on the ——— day of ———, 18—, pay the balance of the purchase-money at the office of the solicitors of the vendors at their office at ———, and the purchase shall then and there be completed. [*Preparation and execution of conveyance, &c., ante*, p. 405.]

Vendors only to give statutory covenant against incumbrances.

8. The vendors are selling as mortgagees under their statutory powers of sale, and accordingly shall be required to give only the statutory covenant against incumbrances deemed to be included and implied by reason of their conveying and being expressed to convey as mortgagees.

9. [*Receipt of rents and discharge of outgoings, ante*, p. 406.]

10. [*If purchase not completed on day appointed purchaser to pay interest, ante*, p. 406.]

11. [*If the purchaser shall neglect or fail to comply with the above stipulations the deposit money shall be absolutely forfeited to the vendors, and vendors may rescind and resell, ante*, p. 407.]

As witness, &c.

The Schedule above referred to.

Wood, L. R., 8 Eq. 424; *Castle* v. *Wilkinson*, L. R., 5 Ch. 534; *Hooper* v. *Smart*, L. R., 18 Eq. 683; *Powell* v. *Elliott*, L. R., 10 Ch. 424; *Barker* v. *Cox*, 4 Ch. D. 464; *Horrocks* v. *Rigby*, 9 Ch. D. 180; for an examination of the question of compensation, see *post*, tit. Conditions of Sale.

III.—*CONTRACT by a* TENANT *for* LIFE *under the Settled Land Act*, 1882, *for the* SALE *of the principal* MANSION HOUSE, *and* DEMESNE LANDS *on a Settled Estate and* MANORS, *an* ADVOWSON, *and* LANDS *of* FREEHOLD, COPYHOLD, *and* LEASEHOLD *Tenure; the* TIMBER *to be sold at a* VALUATION (*a*).

THIS CONTRACT made the ——— day of ———, 18—, BETWEEN [*tenant for life*], of &c. (hereinafter referred to as Parties.

(*a*) The main purpose of the Settled Land Act, 1882, is to enable tenants for life (including in that term limited owners generally, *vide infra*) to dispose by sale, lease, or otherwise, of the whole or any part of the settled land, provision being made for securing the purchase-money on a sale, and otherwise protecting the interests of persons entitled in remainder. The Act came into operation on the 1st of January, 1883, and does not extend to Scotland. The Act will be set out, and its provisions will be fully considered, in a later volume of this Work, *sub.* tit. SETTLEMENTS, but it will be convenient to make here a few observations on the subject of contracts by limited owners for sale of the Settled Lands, &c., under the powers conferred by that Act. The Act defines as follows the terms: "settlement," "settled land," "tenant for life," and "trustees:"— Contracts for sale by tenants for life under the Settled Land Act, 1882. Definitions.

"(1) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement." "Settlement."

"(3) Land, and any estate or interest therein, which is the subject of a settlement, is for the purposes of this Act settled land." "Settled land."

"(5) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land for his life, is for the purposes of this Act the tenant for life of that land, and the tenant for life under that settlement." "Tenant for life."

"(6) If in any case there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act."

"(7) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that under the settlement or otherwise the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent."

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the vendor), of the one part, and [*purchaser*], of &c. (hereinafter referred to as the purchaser), of the other part.

"Trustees of the settlement."

"(8) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to an approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement."

Remarks on definitions.

Sect. 63.

It will be observed that the term "*settlement*" here includes instruments merely binding equitable interests, as well as those whereby the legal estate is conveyed. By sect. 63, this definition is extended so as to comprise all settlements made before or after the commencement of the Act, "whereby any lands, or estates, or interest in land, is subject to a trust or direction for sale, and for the application or disposal of the moneys to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction;" and "*settled land*" and "*tenant for life*" have a corresponding signification. The term "*land*" in this Act, as generally in Acts of Parliament, means hereditaments "of any tenure" (see 13 & 14 Vict. c. 21, s. 4), and therefore includes copyholds and leaseholds, as well as freeholds. Sect. 58 of the Settled Land Act, 1882, enumerates nine classes of persons, besides tenants for life strictly so called, on whom are conferred the powers of a tenant for life under the Act, viz.:—(i) A tenant in tail; (ii) a tenant in fee with executory gift over on failure of issue, or in any other event; (iii) an owner of a base fee; (iv) a tenant for years determinable on life, not holding merely under a lease at a rent; (v) a tenant *pur autre vie;* (vi) a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease on a certain event, or to be defeated by an executory gift over, or is subject to a trust for accumulation of income; (vii) a tenant in tail after possibility of issue extinct; (viii) a tenant by the curtesy; and (ix) "a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein, or bankruptcy, or other event." Where an infant is absolutely entitled to land, such land is "settled land," and the infant is tenant for life thereof for purposes of the Act (sect. 59); and in this case the powers of a tenant for life are exerciseable on behalf of the infant by the trustees of the settlement or other persons appointed by the Court for the purpose (sect. 60).

Persons with powers of tenant for life.

Infant.

Where a testator devised lands to trustees upon trust to pay the rents to his wife for the benefit of his infant son, until he should attain twenty-one years of age, and then to the son in fee,

WHEREAS under the will dated the ——— day of ———, 18—, and proved in the Principal Registry of the Probate

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Recitals (*b*), of will creating the settlement;

with an executory gift over in case the son should die under that age, it was held that the infant son was a tenant for life within this section, and that the statutory powers were exerciseable on his behalf by the "trustees of the settlement:" *Re Morgan*, 31 W. R. 948.

By sect. 61, it is enacted that "(2) Where a married woman, who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act."

Married woman.

"(3) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act."

"(6) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act."

As to the separate property of married women, see *ante*, p. 215, *sub* tit. ACKNOWLEDGMENT. The concurrence of the husband will be necessary only where the property is not, by statute or otherwise, separate property.

The Married Women's Property Act, 1882, s. 19 (see *ante*, p. 226), provides that "nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of a married woman." It is still a question how far this enactment limits the other provisions of the Act, and what is the meaning of "settlement" in this section. See *Re Stonor's Trusts*, 24 Ch. D. 195; and note thereon, *ante*, p. 226.

As to whether a deed by a married woman, in exercise of her powers under the Settled Land Act, requires acknowledgment, see *ante*, p. 212.

Where the tenant for life is a lunatic, so found by inquisition, the statutory powers of the Act can be exercised on his behalf by his committee, under an order of the Lord Chancellor (sect. 62). The case of a lunatic tenant for life not so found is not provided for.

In the case of a settlement by way of trust for sale, "the person for the time being beneficially entitled to the *income* of the land, estate, or interest aforesaid *until sale*, shall be deemed to be the tenant for life thereof" (sect. 63). It is clear that under sect. 2 (6), all persons having concurrent interests under the same settlement must join in exercising the statutory forms of the Act; if, however, a moiety or other undivided share of lands is subject to the trusts of a distinct settlement, then such share is settled land within the meaning of the Act, and can be disposed of by the tenant for life thereof without the concurrence of the owner, whether limited or absolute, of the other shares. See Wolst. S. L. Act, p. 12. The 63rd section applies only to the

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Division of her Majesty's High Court of Justice on the ——— day of ———, 18—, of [*testator*], late of &c.,

instrument or instruments which create the trust for sale. Where the persons named in a will as tenants for life of realty, devised on trust for sale, were all dead, it was held that the trustees were able to make a good title to the property without the concurrence of beneficiaries, who had by settlements of their respective shares reduced themselves to the position of tenants for life of those shares: *Re Earle*, 48 L. T. 961. The powers given by the Act are not capable of assignment or release, and any contract not to exercise them is void; but the rights of an assignee for value are not to be prejudiced, and his consent is necessary to any disposition by a tenant for life of the settled land, except a lease thereof, at the best rent obtainable, without fine. If the assignee is in possession, his consent is necessary to the granting of a lease by the tenant for life (sect. 50). Such consent should be testified by concurrence in the conveyance.

Trustees.

In the case of settlements created by deed, will, or otherwise, before 1883, only such persons, if any, as have a power of sale, or of consent to or approval of sale of the settled lands, are trustees of the settlement within the meaning of the Act. In future settlements it will be proper to designate the persons who are to be trustees for the purposes of the Act. Where there are no trustees within the meaning of the Act, or where for any reason it is desirable that such trustees should be appointed, their appointment by the Court may be applied for. See *post*, p. 417, note (*c*).

Power of tenant for life to sell.

By sect. 3, "A tenant for life may sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same." The sale must be for the best price that reasonably can be obtained (sect. 4). On a sale, any restriction or reservation with respect to building on, or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved or made binding, so far as the law permits, by covenant, condition, or otherwise. The surface and minerals, with or without way-leaves, water-rights, &c., may be sold separately under the Act (sect. 17). The tenant for life of an undivided share may concur for the purposes of the Act with any person entitled to or having power or right of disposition of or over another undivided share (sect. 19). As to conveyances by tenants for life, see sect. 20 of the Act, and *post*, *sub.* tit. PURCHASES. As to transfers of incumbrances, affecting property sold, to other parts of the settled lands, see *post*, *sub.* tit. MORTGAGES.

Restriction as to mansion-house, park, &c.

By sect. 15, it is enacted that, "notwithstanding anything in this Act, the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life without the consent of the trustees of the settlement, or an order of the Court." The precise scope and effect of this section is not altogether clear.

deceased, the vendor is now entitled as tenant for life in possession to the mansion-house and demesne, and other

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A "mansion-house" is defined in law to be simply a dwelling-house: Wharton, Law Lex. And Sir *E. Coke*, after stating that a mansion or dwelling-house (*domus mansionalis*) consists of two branches, viz., the inset edifices and the outbuildings, which he particularizes, continues, "And albeit every mansion-house hath not all these buildings, yet every house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed:" 3 Inst. 64.

Mansion-house.

"Demesnes" (*terræ dominicales*) are those parts of the land of a manor which the lord has not granted out in tenancy to the copyholders or customary freeholders, but which are reserved for his own use and occupation: Wharton, Law Lex. See also *Att.-Gen.* v. *Parsons*, 2 Cro. & Jer. 279. In Ireland the word is very general, used with a wider signification than that given above. In *Doyne* v. *Campbell*, I. R., 9 C. L. 95, the term "demesne" was held to include a holding surrounded by a wall, and containing twenty-five acres, ten of which consisted of a villa residence, offices, gardens, and ornamental grounds, and the remaining fifteen acres were fenced fields attached for pasture.

Demesnes.

The word "park" (which occurs only in the heading and marginal note to the section), in its strict legal signification, denotes three essential conditions:—(i) a grant thereof; (ii) inclosure by pale or wall or hedge; and (iii) beasts of a park, such as buck, &c.: *Howard's case*, Cro. Car. 59. Sir *G. Jessel*, M.R., has held that marginal notes form part of Acts: *Re Venour*, 2 Ch. D. 525; but see the remarks of Lords Justices *Bramwell* and *James* in *Att.-Gen.* v. *Great Eastern Railway*, 11 Ch. D. 465.

Park.

In the memorandum annexed to this Act, when introduced in Parliament, it was stated that "special protection is provided for the mansion-house and park; in proper cases they may be sold, but not by the tenant for life alone; he must get the assent of the trustees or an order of the Court." It would appear that, from the terms used, the restriction contained in this section with regard to sale or lease of the mansion-house, &c., is intended to apply to large estates. But by sect. 63 of the Act, dispositions by deed or will of land upon trust for sale are made subject to the provisions of this Act. Until, therefore, the terms above referred to are defined by judicial decision, it will be well, wherever it is possible, to obtain the concurrence of the trustees, so as to testify their consent to the sale by a tenant for life of any land not forming part of a larger estate, and on which there is a residence of any description. Otherwise the purchaser cannot be regarded as absolutely free from risk, unless the sale is sanctioned by an order of the Court: it will be for the purchaser to decide whether, having regard to all the circumstances of the particular case, he will insist on the order being obtained before completion. Where the house and lands intended to be sold form part of a larger estate, there will generally be no difficulty in

Application of sect. 15.

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lands and hereditaments hereby contracted to be sold; and under the same will [*trustee*], of &c., and [*trustee*], of &c., are the present trustees of the settlement thereby created with

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coming to a conclusion, as to whether that house is the principal mansion-house on the estate.

By sect. 31 of the Act it is enacted, that—

Power for tenant for life to enter into contracts.

"(1) A tenant for life (i) may contract to make any sale, exchange, partition, mortgage or charge; and (ii) may vary or rescind, with or without consideration, the contract in like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act."

"(2) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in like case and manner, if any, as if it had been made by himself."

"(3) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying or rescinding thereof."

Other clauses of the section relating to contracts for leases by tenants for life will be considered hereafter, *sub.* tit. Leases. It may be remarked that enfranchisement is not here mentioned among the objects for which a tenant for life may contract; it is apparently included in the term "sale," as sect. 3 (ii) authorizes tenants for life to sell seigniories, &c. so as to effect an enfranchisement.

By sub-sect. (2) a contract by a limited owner is enforceable against successors in title under the settlement as fully as against the tenant for life himself; and the successor's title is not overridden by the contract which he can enforce against the purchaser; and, on completion of the purchase, the purchase-money becomes "capital money" under the Act, subject to the limitations or trusts of the settlement.

Recitals in contract.

(*b*) Where a tenant for life or other limited owner of settled lands exercises his powers of sale under the Settled Land Act, 1882, it is not generally necessary that the contract should recite the instrument creating the settlement, or otherwise indicate in what capacity the vendor acts; and, accordingly, in ordinary cases, the contract or agreement for sale will be in the form given in the preceding precedents. There are, however, two important exceptions to this rule, viz., when the settled lands intended to be sold comprise the principal mansion-house and demesne lands, and where the tenant for life contracts to sell chattels settled so as to go as heirlooms with the settled lands. In both these cases the Act requires certain consents essential to the validity of the contract, and it will be found necessary or convenient that recitals should be introduced stating the nature of the transaction.

power of sale of the settled lands; And whereas on the ——— day of ——— last, the vendor duly gave notice (*c*) of

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(*c*) By sect. 45 of the Act it is enacted that:—

"(1) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice addressed to the trustees severally, each at his usual or last-known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than *one month before* the making by the tenant for life of the *sale*, exchange, partition, lease, mortgage, or charge, *or of a contract for the same.*

of notices having been given.

Notice to trustees.

"(2) Provided that at the date of the notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

"(3) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as aforesaid."

This section is intended to afford protection to persons interested in remainder under the settlement against secret and improper dealings with the settled property by the tenant for life. Although purchasers dealing in good faith with the tenant for life are not concerned to inquire as to the notice having been duly given, notice must in all cases be given, as prescribed in this section, to render the transaction valid as between the tenant for life and the remainderman, and if at the time when it is intended to enter into the contract there are no trustees of the settlement within the meaning of the Act, or only one such trustee, the tenant for life must either appoint trustees or a trustee, as the case may be, in exercise of his powers under the settlement or conferred by statute (see 44 & 45 Vict. c. 41, s. 31), or, if necessary, must apply to the Court to make such appointment under sect. 38 of the Settled Land Act, 1882; and when the full number of two trustees is in existence he must give to them the prescribed notice. An injunction will be granted on the application of a remainderman to restrain a tenant for life from selling, until trustees have been duly appointed for the purposes of the Act: the remainderman is entitled to be served with the summons for the appointment of the trustees, and to object to the persons proposed: *Wheelwright* v. *Walker*, 23 Ch. D. 752. See also *Re Taylor* (C. A.), W. N. 1883, p. 95. The Court has refused to appoint as trustee for the purposes of the Act the tenant for life, *Re Harrop*, 48 L. T. 937, or his solicitor: *Wheelwright* v. *Walker*, 23 Ch. D., at p. 763: see also *Re Kemp's Estate*, 31 W. R. 930, in which case the solicitor was one of the original trustees of the settlement. During the month which is to elapse between the giving the notice, and the completion of the intended sale

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his intention to make the sale hereby contracted to be made to each of the said trustees, and also to their solicitors,

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or other transaction, it will be open to the trustees to object thereto, and if they think proper, to refer the matter to the Court under sect. 44 of the Act. It is, however, to be observed that the statute does not impose any obligation on them to interfere, however improper the transaction may be; they are not liable for adopting any contract made by the tenant for life, or bound to inquire into the propriety of any purchase, &c. (sect. 42); any interference will be at their own risk as regards the costs of the application (sect. 44). See, however, the observations of *Pearson*, J., in *Wheelwright* v. *Walker*, 23 Ch. D. at p. 762.

Form of notice.

The Act does not prescribe the form or contents of the notice to be given; and it is considered by an eminent conveyancer that it may be a general notice, given by the tenant for life on coming into possession, to the trustees of his intention to sell all or any part of the estate, when a proper opportunity offers; and that such notice would not lapse, even in the event of a total vacancy in the trusteeship. See Wolst. S. L. Act, p. 33. But with all deference to this weighty opinion, it is conceived that this construction, until judicially confirmed, is open to question.

General notice not sufficient.

The section does not say that if the tenant for life intends to *sell* he shall give notice of such intention, but that "when intending to *make a sale*" he shall give notice by letter, "posted not less than one month before *the making* by the tenant for life *of the sale* . . . or of a contract for the same:" it is submitted that "to *make a sale*" must mean to make *a particular* sale, whether of the whole or of a specified part of the settled lands; so that, whenever the tenant for life enters into negotiations for such sale, the notice should then be given, and if the negotiations for sale of any part of the property fall through with one intending purchaser, and fresh negotiations for sale of the same part are (after such an interval of time as to constitute the latter negotiations a separate transaction) entered into with the same or another purchaser, a fresh notice should be given. In the interval between the two transactions, circumstances may have arisen, giving ground for objecting to the sale, and if a general notice were to be held to be sufficient, it is evident that, as Mr. Wolstenholme himself admits, the protection afforded to remaindermen by this section would be so slight as to be practically almost illusory. The notice must be given one month before the making of a contract for the sale, and not merely before the completion of the sale; and accordingly, in *Wheelwright* v. *Walker*, 23 Ch. D. 752, where there were no trustees of the settlement, a tenant for life was restrained by injunction from advertising the settled lands for sale by public auction until trustees should have been appointed for purposes of the Act, and until due notice should have been given to them.

The posting of the letters is sufficient notice, whether the letter is received or not. See *Household Fire Insurance Company* v. *Grant* (C. A.), 4 Ex. D. 216, and the cases there cited. It does not

Messrs. ———, of ———, Lincoln's Inn Fields, London; NOW THESE PRESENTS WITNESS, and the vendor,

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appear to be open to the trustees to accept notice from the tenant for life in any other way or through any other channel than those prescribed in this section.

Contract.

The consequences of non-observance of the formalities prescribed are not fully or expressly stated in this section, and the question can only be completely settled by decisions of the Court. The following considerations on this point must, however, be borne in mind:—

Results of not giving prescribed notice.

(i) A tenant for life in the exercise of his powers is a trustee for all parties interested (sect. 53); see, however, the observations of Bacon, V.-C., in *Thomas* v. *Williams*, 24 Ch. D. at p. 566; his omission to give the prescribed notice would clearly be a breach of trust on his part, and consequently it is conceived he would not be in a position to enforce specific performance in case the purchaser were to refuse to carry out the contract. See *Thompson* v. *Blackstone*, 6 Beav. 470.

(ii) In case the tenant for life were to refuse to carry out the contract, a *bonâ fide* purchaser would be entitled to bring an action against him for specific performance; but in that case the trustees or remainderman might intervene on hearing of the intended sale, and object thereto. See *Wheelwright* v. *Walker*, 23 Ch. D. 752. The transaction not having been completed would be subject to the control of the Court, and if it should be set aside, the only remedy of the purchaser would be against the tenant for life personally in respect of damage for non-performance.

(iii) Although the sale once completed cannot be set aside, unless on the ground of fraud to which the purchaser was a party, the selling tenant for life will be personally liable, as trustee for persons interested, to make good any loss to the estate occasioned by an improvident sale by him; it cannot, however, be doubted that in such a case if the prescribed notices had been duly given, and full opportunity thus given for objections to be made to the sale, the tenant for life would have a good answer to any one seeking to make him thus liable, except in the case of fraudulent misrepresentation or collusion with the trustees.

General protection of purchasers, &c.

By sect. 54 of the Settled Land Act, 1882, it is enacted that: "On a sale, exchange, partition, lease, mortgage or charge, a purchaser, lessee, mortgagee, or other person, dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requirements of this Act."

Bonâ fide purchaser.

A purchaser would not be dealing in good faith if acting in collusion with the tenant for life to carry out a sale at an undervalue, or in other respects prejudicial to the interests of the remaindermen, or if he had actual or constructive notice of the non-observance by the tenant for life of the requirements of the Act as regards notice to trustees of the intended sale. As to constructive notice, see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), sect. 3.

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so far as relates to the acts on his part to be performed, agrees with the purchaser, and the purchaser, so far as relates to the acts on his part to be performed, agrees with the vendor as follows, that is to say:—

Sale and purchase.

Parcels.

1. The vendor shall sell, and the purchaser shall purchase, for the price of £——— (to be paid in manner hereinafter mentioned), ALL THAT the mansion-house known as ——— Hall, situate in the parish of ———, in the county of ———, with the stables, outbuildings, gardens, pleasure grounds, park, and demesne lands thereto belonging, and usually held therewith; AND ALSO all and singular the messuages, farms, lands and hereditaments, containing by admeasurement altogether ——— acres or thereabouts, and situate in the parishes of W. X. Y. and Z. respectively, and in the county of ——— aforesaid, and all which hereinbefore mentioned premises are particularly described in the schedule hereunder written and delineated in the map or plan hereunto annexed; AND ALSO all those the two several manors or lordships, or reputed manors or lordships of X. and Y., in the county of ——— aforesaid, with their respective rights, members, and appurtenances; AND ALSO all that the advowson and right of patronage and presentation of and to the rectory of ——— aforesaid; AND ALSO all other (if any) the lands, tenements, and hereditaments whatsoever situate in the parishes of W. X. Y. and Z. respectively, and of or to which the vendor is now seised or entitled as tenant for life in possession, under or by virtue of the said will.

Particulars as to tenure, &c.

2. The bulk of the property is of freehold tenure, but subject as to part thereof to a fee farm rent of £——— per annum payable to the lord of the manor of Z.; ——— acres or thereabouts are of copyhold tenure, and are held of the manor of Z. aforesaid, at quit rents amounting altogether to £——— per annum, and are also liable to fines and heriots; and the remainder of the property, comprising ——— acres or thereabouts, is of leasehold tenure, and held for the unexpired residue of a term of ——— years from the ——— day of ———, 18—, granted by an indenture of lease dated the ——— day of ———, 18—, and expressed to be made between [*parties*] at the yearly rent of £———, and subject to the lessees' covenants, and conditions therein contained. Subject and except as herein is mentioned the property will be sold absolutely free from incumbrances.

III. Sale of Mansion-house, Manors, &c. by Tenant for life.

3. The tenant's fixtures in and about the mansion-house, and all iron hurdles and iron fencing, and all the timber and timberlike trees, tellers, pollards and saplings, down to the value of one shilling per stick, and the underwoods and plantations down to the stem (except the shrubs, plants, and fruit, and other trees in the flower garden and kitchen gardens adjoining the mansion-house), and all agricultural machinery and implements, and the growing crops, dung, and compost, and all acts of husbandry and all rights usually appraised by the custom of the country as between an incoming and an outgoing tenant shall be paid for by the purchaser at the time fixed for the completion of the sale at a valuation to be made by two referees, one to be nominated by the vendor and the other by the purchaser, or by an umpire to be appointed by such referees before proceeding to a valuation; but if either the vendor or purchaser shall refuse or neglect to nominate a valuer, and to notify such nomination in writing to the other of them, before the ——— day of ——— next, or if the valuer nominated by either party shall refuse or neglect to act, then the decision and valuation shall be made by the referee (if duly notified as aforesaid) of the other party alone.

Fixtures, timber, crops, &c. to be taken at a valuation.

4. The purchaser shall allow the vendor to have the use, until the ——— day of ——— next, of the barns, dressing rooms, stack-yards and farm buildings, on the home farm.

Vendor to have use of barns.

5. Upon or immediately after the execution of this contract the purchaser shall pay by way of deposit into the

Payment of deposit (*d*).

(*d*) Unless the purchase-money is, by direction of the tenant for life, paid into Court, it must be paid to the trustees of the settlement to be invested or applied by them as capital money arising under the Act; the payment must not be made to "fewer than two persons as trustees of the settlement, unless the settlement authorizes the receipt of *capital* trust-money of the settlement by one trustee" (sect. 39); and the receipt of the trustees, or of one trustee, if empowered to act, or of the personal representatives or representative of the last surviving or continuing trustee, is the only proper discharge to the purchaser for the payment of the purchase-money or any part thereof (sect. 40), except in the case of payment into Court, which effectually exonerates the person paying in the money (sect. 46).

Payment of purchase-money under Settled Land Act, 1882.

It frequently happens that trustees have no existing account with any bankers, and it may not be thought worth while to open an account in their names, merely for the purpose of receiving the amount of the deposit. It must be borne in mind

III. Sale of Mansion-house, Manors, &c. by Tenant for life.

bank of Messrs. ———, to the credit of the account of the said [*trustees*] the sum of £———, and a receipt for the same, signed by the said trustees, shall upon such payment be handed over to the purchaser by the said bankers; and the purchaser shall pay the balance of the purchase-money at the time and in manner hereinafter mentioned.

Delivery of abstract.

6. Within ——— days from the date of these presents the vendor shall at his own expense make and deliver to the purchaser or his solicitor an abstract of the title of the vendor to the property sold, subject to the following stipulations:—

Commencement of title (*e*).

As to the greater part of the property being of freehold tenure, and comprising the mansion-house and its appurtenances, and the demesne lands, and the farms, cottages, lands, and hereditaments particularly described in the first part of the said schedule hereunder written, the title shall commence with indentures of lease and release dated the ——— and ——— days of ———, 18—, respectively, being a conveyance of the same premises to A. B.: And as to the other part of the property, also being of freehold tenure, comprising the several farms, cottages, lands, and hereditaments particularly described in the second part of the same schedule, the title shall commence with a general demise of real estate contained in the will of [*testator*], of, &c. deceased, and the purchaser shall assume without proof that the said [*testator*] was [at the date of his said will and thereafter until his death (*f*)] seised or otherwise entitled in fee simple, free from incumbrances, of or to the last-mentioned premises: And as to other part of the property, being the copyhold portion thereof, and containing ——— acres or thereabouts, and comprising

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that trustees are not justified in permitting their solicitor to receive the proceeds of sale of the settled property: *Re Bellamy and Metropolitan Board of Works* (C. A.), 4 L. T. 801. Unless, therefore, it is convenient for the trustees or one of them to attend upon the execution of the contract to receive the purchase-money, other arrangements must be made, *e. g.*, it may be stipulated that the purchaser shall pay the deposit—

"into the ——— Bank to a deposit account in the joint names of the vendor and purchaser, and at their joint risk."

(*e*) For other stipulations as to title, evidence of title, &c., see tit. Conditions of Sale.

(*f*) The words in brackets will be necessary only in the case of a will dated before 1837.

III. Sale of Mansion-house, Manors, &c. by Tenant for life.

the several closes of land and hereditaments also particularly described in the second part of the same schedule, the title shall commence with an admittance dated, &c. : And as to the leasehold portion of the property, comprising the messuages and lands thereto adjoining, particularly described in the third part of the said schedule, the title shall commence with the said hereinbefore-mentioned indenture of lease : And as to the residue of the property, comprising several detached cottages, closes of land, and hereditaments, containing altogether ——— acres or thereabouts, and particularly described in the fourth part of the said schedule hereunder written (and which last-mentioned premises were purchased by the vendor, or by the trustees of the said indenture of settlement, at his request from time to time since the year 18—), the purchaser shall be satisfied with such titles as the vendor himself or the said trustees accepted on the occasion of the respective purchases.

7. [*Delivery of objections and requisitions, ante*, p. 409.]

Sale made subject to fee farm rent and manorial rights, &c.

Errors to be subject of compensation.

8. The sale is made subject to the said fee farm rent of £———, and to the quit and other rents, heriots, fines and services, and covenants hereinbefore mentioned or referred to respectively, and all rights of the lord of the said manor of C., and to all subsisting rights of way and water, and other easements affecting the premises. If any mis-statement, error, or omission shall, in the description of the premises, or any other error whatsoever, be discovered relating thereto, such mistake, omission, or error shall not annul the sale, but a compensation shall be allowed or given by the vendor or purchaser as the case may require, such compensation to be settled by two referees, or their umpire, to be appointed in manner provided by clause 3 hereof.

As to creation of rents, &c.

9. No requisition or inquiry shall be made as to the creation or origin of the said fee farm rent, or of any of the said quit and other rents, fines, and heriots.

As to evidence of identity.

10. The vendor shall not be required to distinguish the precise limits or boundaries of the said manors hereby agreed to be sold respectively, or of the several lands held under different titles as aforesaid, or to furnish any evidence or information not in his possession as to the existence or nature of any manorial rights or franchises, or otherwise, as to the said manor, or as to the identity of the property sold with that described in the muniments of title.

III. Sale of Mansion-house, Manors, &c. by Tenant for life.

11. The purchaser shall assume that all notices required by the Settled Land Act, 1882, have been duly given, and shall not make any objection or requisition with respect to such notices.

As to notices.

12. [*If requisitions are insisted on, vendor may rescind, ante*, p. 404.]

Completion of purchase.

13. The purchaser shall on the ——— day of ———, pay to the trustees at the office of their said solicitors at ——— Lincoln's Inn Fields, the balance of the purchase-money, and the amount of the valuation aforesaid (*f*), and the purchase shall then and there be completed; the vendor and all other necessary parties shall thereupon execute a proper conveyance of the property to the purchaser. Such conveyance [*preparation of conveyance, ante*, p. 405].

As to covenants for title by vendor and concurrence of trustees.

14. Inasmuch as the vendor is selling as tenant for life under the powers of the Settled Land Act, 1882, he shall not be required to enter into any covenants for title other than such as are implied by his conveying as beneficial owner; PROVIDED always that as regards the reversion or remainder expectant on the determination of his life estate, and the title to and further assurance of the property after his death, such implied covenants shall not extend to the acts or defaults of any person other than himself, and his heirs, and persons deriving title under him or them. The trustees of the said indenture of settlement will concur in the conveyance, but only for the purpose of testifying their consent to the sale hereby contracted to be made, and acknowledging the receipt of the purchase-money, and of the amount of the said valuation, and their concurrence shall not be required for any other purpose.

15. [*Purchaser to have possession on day fixed for completion, ante*, p. 406.]

16. [*If purchase not completed on day fixed, purchaser to pay interest for the purchase-money "and the amount of the valuation aforesaid," ante*, p. 406.]

(*f*) Where the deposit is paid to a deposit account in the joint names of the vendor and purchaser, add,

"And at the same time the deposit shall be withdrawn from the said bank and paid over to the said trustees, but all interest which shall have accrued thereon up to that date shall be paid to the purchaser."

17. [*On default of purchaser to complete, the deposit shall be forfeited to the vendor, and vendor may rescind this contract, and resell the property, ante*, p. 407.]

III. Sale of Mansion-house, Manors, &c. by Tenant for life.

18. The contract hereby expressed and intended to be made shall not become absolutely binding upon the vendor until the expiration of one calendar month from the said ——— day of ——— (*g*), without any proceedings being taken to prevent the sale hereby contracted to be made.

Contract not to be absolutely binding till expiration of period of notice.

As witness, &c.

The Schedule above referred to.

IV. *PROVISIONAL CONTRACT by a* Tenant for Life *under the Settled Land Act*, 1882, *for the* Sale *of* Heir-Looms (*h*).

THIS CONTRACT made the ——— day of ———, 18—, Between [*tenant for life*], of ——— Hall, in the County of ——— (herein referred to as the vendor) of the one part, And [*purchaser*], of &c. (hereinafter referred to as the purchaser) of the other part: Whereas under or by virtue of an indenture of settlement dated the ——— day of ———, 18—, and expressed to be made between [*parties*], the vendor is now entitled as tenant for life in possession to the settled lands thereby devised, and to certain personal chattels, including the chattels and articles specified in the schedule hereto annexed, settled on trusts so as to devolve with the said settled lands until a tenant in tail by purchase should attain the age of twenty-one years;

Parties.

Recitals, of settlements;

(*g*) This clause will only be necessary when the notice was given to the trustees and their solicitor less than one month before the execution of the contract for sale.

(*h*) By sect. 37 of the Settled Land Act, 1882, it is enacted that—

Heirlooms.

"(1) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

"(2) The money arising by the sale shall be capital money arising under this Act," &c.

"(3) A sale or purchase of chattels under this section shall not be made without an order of the Court."

IV. Sale of Heirlooms by Tenant for Life.

AND WHEREAS by an order dated the ——— day of ———, 18—, and made by his lordship Sir A. B., one of the justices of the Chancery Division of Her Majesty's High Court of Justice [*trustee*], of &c. and [*trustee*], of &c., were on the application of the said vendor appointed trustees under the said will for the purposes of the Settled Land Act, 1882;

of appointment of trustees;

of notice to trustees.

AND WHEREAS on the ——— day of ———, 18—, the vendor duly gave notice of his intention to make sale of the said chattels and premises specified in the schedule hereto annexed to each of the said trustees and also to their solicitors, as required by sect. 45 of the said Act. NOW THESE PRESENTS WITNESS, and the vendor (so far as relates to the acts on his part to be performed) hereby agrees with the purchaser, and the purchaser (so far as relates to the acts on his part to be performed) hereby agrees with the vendor as follows, that is to say:—

Agreement for sale.

1. The vendor shall sell, and the purchaser shall purchase for the sum of £———, the jewels, plate, pictures, statues, and other works of art, books, furniture, and other chattels and articles specified in the schedule hereto annexed.

Payment of purchase-money to deposit account.

2. Immediately upon the execution of these presents, the purchaser shall pay by way of deposit into the bank of Messrs. ———, to the credit of the account of the said trustees, the sum of £———, and shall pay the balance of the purchase-money into the said bank to the credit of the same account on the ——— day of ———, 18—, or as soon as conveniently may be thereafter, on which day the purchase shall be completed.

Purchaser to pay interest till payment.

3. If the purchaser shall not, on or before the said ——— day of ———, pay the balance of the purchase-money in accordance with the stipulation hereinbefore contained, he shall pay interest for the same at the rate of £5 per cent. from that date until actual payment of the said balance, such interest to be paid, together with the said balance, into the said bank, and to the credit of the account aforesaid: PROVIDED ALWAYS that the purchaser shall not be bound to pay in the balance of the purchase-money, or any interest for the same, unless an order of the Court as hereinafter is mentioned shall have been obtained on or before the ——— day of ———, 18—.

Delivery of heirlooms to purchaser.

4. Upon production of the said receipts for the payment of the deposit and balance of the purchase-money respec-

IV. Sale of Heirlooms by Tenant for Life.

tively, the said chattels and premises, specified in the schedule hereto annexed, shall be delivered over to the purchaser, or to any person or persons authorized by him in writing to receive the same at ——— Hall aforesaid, and shall be removed therefrom by him or them at his or their own risk.

Title.

5. The vendor shall not be required to furnish any evidence of his title to the premises, other than and except the said indenture of settlement, and the schedule, or inventory of the chattels held as heirlooms under the trusts of the same settlement. The said indenture of settlement and inventory may be inspected by the purchaser, or his solicitor, at the office of Messrs. ———, the vendor's solicitors, but the purchaser shall not be entitled to make or be furnished with any copy or abstract of the said indenture of settlement and inventory respectively.

6. [*Purchaser to assume that notices have been duly given, ante*, p. 424.]

Vendor to apply for order of Court.

7. The vendor will, at the expense of himself, or of the settled estate, forthwith apply for and endeavour to obtain an order of the Court sanctioning the sale hereby agreed to be made of the said chattels and premises; and unless such order shall have been obtained before the ——— day of ———, 18—, this agreement shall be void, and thereupon the said deposit, with all interest actually accrued thereon, but without any further or other interest, costs, or compensation whatsoever, shall be paid to the purchaser.

8. [*Contract not to bind vendor for a month after giving notice to trustees, ante*, p. 425.]

9. [*On default of purchaser to complete, vendor may rescind contract and resell, ante*, p. 407.]

As witness, &c.

The Schedule above referred to.

V. *AGREEMENT by* Trustees *for the* Sale *of a* Leasehold *messuage, &c.—Application of* Insurance Moneys *in event of fire before completion.*

Parties.

THIS CONTRACT, made the ——— day of ———, 18—, Between [*trustee*], of &c., and [*trustee*], of &c. (hereinafter called the vendors), of the one part; and [*purchaser*], of &c. (hereinafter called the purchaser), of the other part, Whereby it is agreed and declared as follows, that is to say:—

Agreement for sale and purchase—Parcels.

1. The vendors shall sell, and the purchaser shall purchase at the price of £———, all that leasehold messuage and [*describe parcels*], situate in the parish of ———, in the county of ———, and now held by the vendors for the residue of a term of 99 years from the ——— day of ———, 18—, granted by an indenture of lease dated the ——— day of ———, 18—, and expressed to be made between [*lessor*] of the one part, and [*lessee*] of the other part, at the yearly rent of £———, and subject to the lessees' covenants and conditions therein mentioned.

Delivery of abstract.

2. The vendors shall within ——— days from the date hereof at their expense deliver to the solicitor of the purchaser an abstract of their title to the premises commencing with the said lease. The production of the receipt for the last payment due for rent under the lease shall be deemed conclusive evidence that all the covenants and conditions of the lease have been duly performed and observed, or that all breaches (if any) of such covenants and conditions have been waived up to the day of completion of the purchase (*a*).

3. [*Delivery of objections and requisitions, ante*, pp. 403, 409.]

4. [*If requisitions, &c., are insisted on vendors may rescind, ante*, p. 404.]

(*a*) Here insert any special conditions as to title. The Conveyancing Act, 1881, s. 3 (4), renders the production of the last receipt for rent evidence of the performance of the covenants, &c. of a lease (not including underlease), "unless the contrary appears," subject to the terms and provisions of the contract.

Where there is considerable beneficial interest, the land being let at a low ground rent, there is considerable risk in purchasing under either the stipulations in the text, or the statutory provisions, see *Patman* v. *Harland*, 17 Ch. D. 353; and unless the lease is of ancient date, or the lessor a person of known position, a purchaser should require a stipulation providing for the production of some evidence of the lessor's title to be inserted in the contract.

V. Sale of Leaseholds by Trustees.

5. The said lease contains a provision that the lessees shall not assign without license from the lessor. The vendors shall immediately after the execution of this contract apply for and endeavour to obtain such license, and if they shall be unable to obtain the same before the ——— day of ——— they shall be at liberty to rescind the sale in manner provided by the last preceding clause hereof.

Vendors to obtain lessor's license to assign.

6. [*Errors in description, &c., not to annul the sale, nor entitle parties to compensation, ante*, p. 409] (*b*).

7. [*Completion of purchase, and preparation and execution* of "assignment," *ante*, p. 405.]

8. The vendors are trustees for sale, and the concurrence of beneficiaries to the sale shall not be required, except so far (if at all) as required by the Settled Land Act, 1882, and such consents (if any) shall be sufficiently evidenced by letters signed by such beneficiaries, and authorizing the trustees to effect the sale hereby agreed to be made. The signatures shall be deemed to be sufficiently authenticated by declarations to be made by persons acquainted therewith.

As to concurrence of beneficiaries.

9. All deeds and documents which relate exclusively to the property hereby agreed to be sold shall be handed over to the purchaser on completion; but such deeds and documents as relate not only to that property, but also to other property of the vendors, shall be retained by them, and the vendors shall enter into the usual statutory acknowledgment for the production of the deeds and documents retained, but shall not be required to enter into any undertaking for the safe custody thereof [*or*, and shall also give a qualified undertaking for the safe custody thereof, whereby their liability shall cease on parting with the actual possession of the said deeds and documents].

As to custody of deeds, &c. (*c*).

10. [*If purchase not completed by day appointed, purchaser to pay interest, ante*, p. 406.]

11. If the said messuage and premises or any part thereof

Application of insurance

(*b*) Trustee vendors are not entitled to allow compensation for the consequences of their own errors: *White* v. *Cuddon*, 8 Cl. & F. 766; *Hobson* v. *Bell*, 2 Beav. 17. In a sale by trustees it is therefore usual to provide that no compensation shall be allowed: Dart, V. & P. 143. See further, as to this condition, *ante*, p. 404, note (*e*); and see tit. Conditions of Sale.

(*c*) As to this clause, see tit. Acknowledgments, *ante*, p. 251 *et seq.*, and tit. Conditions of Sale, in Vol. II.

V. Sale of Leaseholds by Trustees.

shall be destroyed or damaged by fire before the completion of the purchase all moneys which shall be received by the vendors under the existing insurance of the premises shall be applied in or towards reinstating the same, or shall be paid to the purchaser, as he shall require.

moneys in event of fire before completion (*d*).

12. [*On default of purchaser to complete, vendors may rescind and resell, ante*, p. 404.]

As WITNESS, &c.

VI. *AGREEMENT for the* SALE *of a* LEASEHOLD FARM—*Purchaser to be let into possession before acceptance of title.*

AN AGREEMENT made the ——— day of ———, 18—, BETWEEN [*vendor*], of &c. (hereinafter referred to as the vendor), of the one part, and [*purchaser*], of &c. (hereinafter referred to as the purchaser), of the other part, WHEREBY it is agreed as follows, that is to say:—

Parties.

Agreement to sell and purchase.

1. The vendor shall sell and the purchaser shall purchase all that farmhouse, farms, &c. [*describe parcels by reference to schedule, ante*, p. 408], for the price of £———, whereof part, that is to say, £———, shall be paid by way of deposit upon the execution of those presents, and the remainder thereof upon the completion of the purchase.

2. [*Delivery of abstract, ante*, p. 403.]

3. [*Delivery of requisitions, &c, ante*, p. 403.]

Errors not to annul sale, &c.

4. If any error, misdescription, or omission shall be discovered the same (if capable of compensation) shall not annul the sale, but a compensation shall be allowed or given by the vendor or purchaser as the case may require, such compensation to be settled, in case of difference of opinion, by A. B., of &c., as referee on behalf of the vendor, and C. D., of &c., as referee on behalf of the purchaser, if they agree, and by E. F., of &c., if the said referees should disagree, and the

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(*d*) A contract for sale of a house contained no reference to an existing insurance: after the date of the contract, but before completion, the house was damaged by fire; it was held that the purchaser was not entitled as against the vendor to the benefit of the insurance: *Rayner* v. *Preston* (C. A.), 18 Ch. D. 1.

VI. Sale of Leasehold Farm.

decision of the said referees or of the said umpire, as the case may be, shall be final.

Completion of purchase.

5. The vendor undertakes to deduce a good and marketable title to the premises on or before the ——— day of ———, and the purchaser shall on that day pay the balance of the purchase-money at the office of Messrs. ———, the solicitors of the vendor, at ———, and the purchase shall then and there be completed; and thereupon the vendor, &c. [*will execute* "assignment," *ante*, p. 405].

Purchaser to take possession before completion.

6. The purchaser shall be at liberty to take possession of such parts of the premises as are described in the schedule hereunder written as meadow, pasture, and woodlands on the ——— day of ——— next, and of such parts of the said premises as are described in the said schedule as arable lands on the ——— day of ——— next, and of the remainder of the premises on the ——— day of ——— next, as fully to all intents and purposes as if an assignment of the premises had actually been executed: PROVIDED always that such taking of possession shall not be deemed to be an acceptance by the purchaser of the vendor's title, or any waiver or abandonment by the purchaser of his right to make requisitions and objections as hereinbefore provided in respect of such title (*e*).

If completion delayed, purchaser to pay interest.

7. The purchaser shall not be required to make to the vendor any payment by way of rent, interest, or otherwise, by reason of his taking possession as aforesaid of the premises before the completion of the purchase, and occupying them up to the said ——— day of ——— next, but if the purchase shall not be completed on that day from any cause whatever, other than a default by the vendor in deducing a good and marketable title on or before that day, the purchaser shall pay interest on the unpaid balance of the purchase-money at the rate of £5 per cent. per annum, until completion of the purchase.

(*e*) Entry into possession before conveyance generally amounts to a waiver of all objections to title, *Fludyer* v. *Cocker*, 12 Ves. 25, unless under special circumstances, as when the purchaser takes possession at the instance of the vendor representing the title to be perfect, *Vancouver* v. *Bliss*, 11 Ves. 458; so if the contract expressly authorizes the purchaser to take immediate possession: *Stevens* v. *Guppy*, 3 Russ. 171. The above Precedent is adapted from the contract set out in *Williams* v. *Shaw*, 3 Russ. 178 (note).

VI. Sale of Leasehold Farm.

8. If on account of any defect of title which the vendor shall be unable to remove, it shall be found impossible to complete the purchase before the ——— day of ———, 18—, this agreement shall be absolutely void, and thereupon the vendor shall repay to the purchaser the sum of £——— [i.e. *the deposit*], with interest at the rate of £——— per cent. per annum as from the date of this agreement, until such avoidance as aforesaid thereof; but the purchaser shall not be entitled to any other compensation or payment whatever.

If purchase not completed before fixed time, this agreement to be void.

As WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

VII. *AGREEMENT for the* SALE *of a* LEASEHOLD SHOP, FIXTURES, STOCK-IN-TRADE, *and* GOODWILL *of a business*—PURCHASE-MONEY *to be paid by* INSTALMENTS—*Unpaid instalments to be secured by Purchaser's Bond and by Mortgage of the premises and fixtures, &c.*

AN AGREEMENT made the ——— day of ———, 18—, BETWEEN [*vendor*], of &c. (hereinafter referred to as the vendor), of the one part, and [*purchaser*], of &c. (hereinafter referred to as the purchaser), of the other part: WHEREAS the vendor has for some time past carried on the trade or business of a ———, in the city of ———, at a shop [*or* manufactory] to which the vendor is entitled for the remainder of a term of ——— years therein granted to him by a lease dated the ——— day of ———, 18—, and expressed to be made between [*lessor*] of the one part and the vendor of the other part. NOW THESE PRESENTS WITNESS, and it is hereby agreed and declared by and between the parties hereto as follows, that is to say:—

Parties.

Recital of lease of premises.

Witnesseth.

1. The vendor shall sell and the purchaser shall purchase ALL THAT the shop [*or* manufactory] aforesaid, with the appurtenances, for the residue now to come of the said term, and at the yearly rent of £——— reserved by the said lease, and subject to the lessees' covenants and conditions therein

Agreement for sale and purchase of shop and goodwill at fixed price;

VII. Sale of Shop and Goodwill, &c.

contained, TOGETHER WITH the goodwill (*f*) of the said trade or business, for the sum of £———, payable as is hereinafter mentioned: AND ALSO all the implements, utensils and fixtures in and upon the said shop [*or* manufactory] and used or employed in the said trade or business of a ———; and all the stock-in-trade and book and other debts belonging and owing to the vendor respectively, and the benefit of all contracts and engagements relating to the said trade or business entered into between him and other persons for a sum to be determined by valuation in manner hereinafter mentioned.

of fixtures, stock-in-trade, &c. at a price to be settled by valuation.

2. The premises agreed to be purchased for a sum to be determined by valuation shall be valued according to their respective values on the ——— day of ——— next. The valuation shall be made by [*referee*], of &c. on behalf of the vendor, and by [*referee*], of &c. on behalf of the purchaser; and in case they shall not agree in their valuation, then by such umpire as the said referees shall, before proceeding to their reference, for that purpose appoint. If either of the said referees shall die or refuse to act, or become incapable of acting in the reference before the completion of the valuation, another referee shall be appointed in his place by the party who originally appointed the referee so dying, refusing or becoming incapable as aforesaid; and if the umpire so to be appointed as aforesaid shall die or refuse to act or become incapable of acting before completion of the valuation, the referees shall appoint another umpire in his place.

Valuation, how to be taken.

3. The purchaser shall pay a deposit of £———, upon the execution of this agreement. The remainder of the purchase-money shall be paid in manner hereinafter mentioned.

Payment of deposit.

4. [*Delivery of abstract of title to the* "leasehold" *premises, ante*, p. 403.]

(*f*) In this Precedent the intention is that the vendor shall not in any way compete with the purchaser; see clause 8. Where the vendor is to be at liberty to carry on a similar business in the neighbourhood, a special clause enabling him to do so should be inserted in the contract: See *Johnson* v. *Helleby*, 34 L. J., Ch. 179, where the Court ordered the insertion in the advertised conditions for sale of a business the following stipulation:—"This sale will give to the purchaser both the premises on which the business has been carried on, and the benefit to be derived from the habit of customers resorting to the said premises; but will not prevent persons formerly interested in the said business, or those who may represent them, from carrying on the same business."

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5. [*Objections and requisitions on title, ante*, p. 403.]

Payment of purchase and valuation-money by instalments (*a*).

6. The purchaser shall pay the remainder of the purchase-money, including the sum which shall be determined by valuation as aforesaid, by the instalments and in manner following (that is to say), one instalment of £——— on the ——— day of ——— next, on which day the purchase shall be completed; a second instalment of £——— on the ——— day of ———, 18—; a third instalment of £——— on the ——— day of ———, 18—, and the last instalment, being the balance remaining due after the payment of the said deposit and these instalments respectively, on the ——— day of ———, 18—. And the instalments for the time being remaining unpaid shall bear interest at the rate of £5 per cent., as from the said ——— day of ——— next.

Assignment to be executed;

7. On receiving from the purchaser the said instalment or sum of £———, made payable on the said ——— day of ——— next as aforesaid (*b*), the vendor will make and execute a proper assignment of the premises to the purchaser, such assignment to be prepared by and at the expense of the purchaser, and to be left not less than ——— days before the completion of the purchase, for the approval of the solicitors of the vendor, at their office in ——— Street, in the City of ——— aforesaid.

to contain covenants by vendor not to carry on same business, &c.;

8. The said assignment shall contain covenants by the vendor to recommend the purchaser to all the late or present customers of the vendor; and not to trade or deal in the said trade or business of a ——— directly or indirectly, alone or in partnership with any person or persons whomsoever in ——— aforesaid, or within ——— miles thereof, for the space of seven years from the said ——— day of ——— next.

to contain covenants by purchaser for payment of instalments, &c.

9. The said assignment shall contain covenants by the purchaser for payment of the said instalments, and of interest after the rate aforesaid on the instalments for the time being remaining unpaid, on the days hereinbefore appointed for payment thereof respectively; and also a proviso that if any instalment or interest, or any part thereof respectively, shall be in arrear, and unpaid after thirty days from the days hereinbefore appointed for payment thereof respectively, then

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(*a*) The days for payment of the several instalments will be fixed at intervals of one year.

(*b*) That is to say the *first* instalment.

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the whole of the purchase-money (including the said sum to be determined by valuation as aforesaid), or the instalments thereof, for the time being remaining unpaid, shall immediately become payable with interest thereon after the rate aforesaid up to the day of payment.

Purchaser to give bond, and execute mortgage, if required.

10. The purchaser, together with some other person to be approved of by the vendor, shall on the said ——— day of ——— next, execute to the vendor a bond in the penalty of £———, for the payment to him of the instalments of the purchase-money (including the sum so to be determined by valuation as aforesaid), which shall then remain unpaid, with interest after the rate and payable at the times hereinbefore mentioned respectively. And the purchaser, if and whenever required by the vendor in writing so to do, shall make and execute to the vendor a proper and valid mortgage of the said shop [*or* manufactory] and premises comprised in the said lease [and also of the implements, utensils, fixtures, stock-in-trade, and effects of the said trade or business], as a further security for the payment of the instalments for the time being remaining unpaid and interest thereon, payable after the rate and at the times hereinbefore mentioned respectively. Such mortgage shall contain all such powers and provisions as may be reasonably required by the vendor [and shall be duly registered as a bill of sale under the Bills of Sale Act (1878) Amendment Act, 1882, or any other statute for the time being in force for regulating such registration].

Delivery of possession.

11. The possession of the premises, with full liberty to use and enjoy the said utensils, implements, fixtures, stock-in-trade, and effects in the same manner as heretofore, shall be retained, and all rates, taxes and outgoings payable for or in respect of the premises shall be paid by the vendor up to the said ——— day of ———, next, and as from that date the possession shall be taken by the purchaser who shall thenceforth pay all the rates, taxes and outgoings; and such rates, taxes, and outgoings shall, if necessary, for the purposes of this stipulation be apportioned.

As witness, &c.

VIII.—*TERMS for the* Purchase *of* Land *by a* Railway Company.

MEMORANDUM of Terms for the purchase of land by the ——— Railway Company.

County of ———. Parish of ———.

Number on plan of land agreed to be purchased: ———.

Admeasurement: ——— acres, ——— roods, ——— perches.

Name and address of vendor: ———, of, &c.

Purchase to comprise the fee simple in the land and the mines and minerals in and under the same.

Purchase-money to include compensation for mines and minerals, severance, accommodation works, and all damage by execution of works, and all rights of preemption over surplus lands, agreed at £———.

Company to have possession on the ——— of ———, 18—.

Rents and profits to be taken, and outgoings paid by the vendor up to the ——— of ——— 18—, and thereafter by the company.

Costs to be paid by the company under the Act.

Surveyor's fees agreed at £———.

Formal agreement to be prepared by the company's solicitors.

[*Signature of vendor.*]
[*Signature of A. B.*],
agent for the company.

Dated the ——— day of ———, 18—.

IX. *AGREEMENT for the* SALE *of* LAND, *with* MINES, *&c., to a* RAILWAY COMPANY (*a*).—*Purchase-money to include Compensation for* SEVERANCE, *&c., and satisfaction for* ACCOMMODATION WORKS.—*Company to have* IMMEDIATE POSSESSION.

AN AGREEMENT made the ——— day of ———, 18—,
BETWEEN A. B., of &c. (hereinafter called the vendor), of Parties.

(*a*) The provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), with regard to the purchase of lands by agreement, are as follows:— Power to purchase lands by agreement.

Sect. 6. "Subject to the provisions of this and the special Act it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the special Act authorized to be taken, and which shall be required for the purposes of such Act and with all parties having any estate or interest in such lands or by this or the special Act enabled to sell and convey the same, for the absolute purchase, for a consideration in money of any such lands, or such part thereof as they shall think proper, and of all estates and interests in such lands of what kind soever."

Sect. 7. "It shall be lawful for all parties, being seised, possessed of, or entitled to any such lands, or any estate or interest therein, to sell and convey or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose; and particularly it shall be lawful for all or any of the following parties so seised, possessed, or entitled as aforesaid so to sell, convey, or release; (that is to say), all corporations, tenants in tail or for life, married women seised in their own right or entitled to dower, guardians, committees of lunatics and idiots, trustees or feoffees in trust for charitable or other purposes, executors and administrators, and all parties for the time being entitled to the receipt of the rents and profits of any such lands in possession or subject to any estate in dower, or to any lease for life, or for lives and years, or for years, or any less interest; and the power so to sell and convey or release as aforesaid, may lawfully be exercised by all such parties other than married women entitled to dower, or lessees for life, or for lives and years, or for years, or for any less interest, not only on behalf of themselves and their respective heirs, executors, administrators, and successors, but also for and on behalf of every person entitled in reversion, remainder, or expectancy after them, or in defeasance of the estates of such parties, and as to such married women, whether they be of full age or not, as if they were sole and of full age, and as to such guardians on behalf of their wards, and as to such committees, on behalf of the lunatics and idiots of whom they are the committees respectively, and that to the same extent as such wives, wards, lunatics, and idiots respectively could have exercised the same power under the authority of this or the special Act, if they had respectively been under no disability, and as to such trustees, executors, and administrators on behalf of their cestui que trusts, whether infants, issue unborn, lunatics, femes covert or other persons, and that to the same Parties under disability enabled to sell and convey.

IX. Sale of Land to Railway Company.

the one part, and the ——— Railway Company (hereinafter called the company) of the other part, WHEREBY IT IS AGREED as follows, that is to say:—

Agreement for sale and purchase.

1. Under or by virtue of the powers, and subject to the

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extent as such cestui que trusts respectively could have exercised the same powers under the authority of this and the special Act if they had respectively been under no disability."

Parties under disability to exercise other powers.

* *I. e.* by sects. 95 *et seq.* of the Act.

Sect. 8. "The power hereinafter* given to enfranchise copyhold lands, as well as every other power required to be exercised by the lord of any manor pursuant to the provisions of this or the special Act, or any Act incorporated therewith, and the power to release lands from any rent-charge, or incumbrance, and to agree for the apportionment of any such rent, charge or incumbrance, shall extend to and may lawfully be exercised by every party hereinbefore enabled to sell and convey or release lands to the promoters of the undertaking."

Amount of compensation in case of parties under disability to be ascertained by valuation and paid into the bank.

Sect. 9. "The purchase-money or compensation to be paid for any lands to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands, except under the provisions of this or the special Act, and the compensation to be paid for any permanent damage or injury to any such lands shall not, except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices under the provision hereinafter contained, be less than shall be determined by the valuation of two able practical surveyors, one of whom shall be nominated by the promoters of the undertaking, and the other by the other party, and if such two surveyors cannot agree in the valuation, then by such third surveyor as any two justices shall upon application of either party, after notice to the other party, for that purpose nominate; and each of such two surveyors, if they agree, or if not, then the surveyor nominated by the said justices, shall annex to the valuation a declaration in writing, subscribed by them or him of the correctness thereof; and all such purchase-money or compensation shall be deposited in the bank for the benefit of the parties interested, in manner hereinafter mentioned."

Where vendor absolutely entitled lands may be sold on chief rents.

* *Repealed by* 23 & 24 *Vict. c.* 106, *s.* 1.

Sect. 10. "It shall be lawful for any person seised in fee of, or entitled to dispose of absolutely for his own benefit any lands authorised to be purchased for the purposes of the special Act to sell and convey such lands or any part thereof unto the promoters of the undertaking, in consideration of an annual rent-charge payable by the promoters of the undertaking [*but except as aforesaid the consideration to be paid for the purchase of any such lands, or for any damage done thereto, shall be in a gross sum]."

Sect. 11. "The yearly rents reserved by any such conveyance shall be charged on the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such rents become payable; and if at any time any such rents be not paid within thirty days after

provisions of the ——— Railway Act, 18—, and of the public Acts incorporated therewith, the vendor, on behalf of himself

IX. Sale of Land to Railway Company.

they so become payable, and after demand thereof in writing, the person to whom any such rent shall be payable may either recover the same from the promoters of the undertaking, with costs of suit, by action of debt in any of the superior courts, or it shall be lawful for him to levy the same by distress of the goods and chattels of the promoters of the undertaking."

Power to purchase lands required for additional accommodation.

Sect. 12. "In case the promoters of the undertaking shall be empowered by the special Act to purchase lands for extraordinary purposes, it shall be lawful for all parties who, under the provisions hereinbefore contained, would be enabled to sell and convey lands, to sell and convey the lands so authorised to be purchased for extraordinary purposes."

Authority to sell and repurchase such lands.

Sect. 13. "It shall be lawful for the promoters of the undertaking to sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner and for such considerations, and to such persons, as the promoters of the undertaking may think fit, and again to purchase other lands for the like purposes, and afterwards sell the same, and so from time to time; but the total quantity of land to be held at any one time by the promoters of the undertaking for the purposes aforesaid, shall not exceed the prescribed quantity."

Restraint on purchase from incapacitated persons.

Sect. 14. "The promoters of the undertaking shall not, by virtue of the power to purchase lands for extraordinary purposes, purchase more than the prescribed quantity from any party under legal disability, or who would not be able to sell and convey such lands, except under the powers of this and the special Act; and if the promoters of the undertaking purchase the said quantity of land from any party under such legal disability, and afterwards sell the whole or any part of the land so purchased, it shall not be lawful for any party being under legal disability to sell to the promoters of the undertaking any other lands in lieu of the land so sold or disposed of by them."

Municipal corporations not to sell without approbation of the Treasury.

Sect. 15. "Nothing in this or the special Act contained shall enable any municipal corporation to sell for the purposes of the special Act, without the approbation of the commissioners of her Majesty's Treasury of the United Kingdom of Great Britain and Ireland, or any three of them, any lands which they could not have sold without such approbation before the passing of the special Act, other than such lands as the company are by the powers of this or the special Act empowered to purchase or take compulsorily."

Sect. 6. Parties to the agreement.

Sect. 6.]—The promoters of the undertaking are defined in sect. 2, as "the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons by the special Act empowered to execute such works or undertaking." As regards railways, for the construction of which a certificate of the Board of Trade operating as a special Act has been issued, under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), the 30th section of that Act provides that "contracts relative to the purchase or taking of lands for the railway,

IX. Sale of Land to Railway Company.

and all persons whomsoever having any estate or interest in the hereditaments hereinafter mentioned, shall sell, and the

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entered into by the promoters before the incorporation of the company by the certificate, shall be as binding on the company as if they had been entered into by the company." With respect to other undertakings, there is a great conflict of decisions as to the effect of contracts between promoters and landowners before the passing of a special Act, in consideration of the withdrawal of opposition to the passage of the bill through parliament. See the cases collected in Shelford on Railways, vol. ii. pp. 509 *et seq.*; and in Browne & Theobald, "Law of Railways," pp. 509—512. Space will not here permit of a full discussion of this question.

Contracts with promoters.

The following points may, however, be regarded as settled: (i) If a company after its incorporation adopts and enjoys the benefit of a contract into which the promoters had entered before the incorporation, the company will in equity be bound by the contract: *Edwards* v. *Grand Junction Canal Co.*, 1 My. & Cr. 650; *S. C.*, 1 Rail. Ca. 173; *Williams* v. *St. George's Harbour Co.*, 2 De G. & J. 547; *Eastern Counties Rail. Co.* v. *Hawkes*, 5 H. L. C. at p. 356. (ii) The contract must, however, be one which might lawfully be made by the company after incorporation: *Preston* v. *Liverpool, Manchester, &c. Rail. Co.*, 5 H. L. C. 605. See also *Taylor* v. *Chichester and Midhurst Rail. Co.*, L. R., 4 H. L. 628, where it was held that an agreement for payment by the company to a landowner of a sum of money as personal compensation absolutely, whether his land was taken or not, was *ultra vires* as being impliedly prohibited by the special Act. (iii) A contract to be valid must be unconditional, and not dependent on the taking of the land or the completion of the railway: *Gage* v. *Newmarket Rail. Co.*, 18 Q. B. 457.

Sect. 7. Persons under disability.

Sect. 7.]—By 27 & 28 Vict. c. 121, s. 3, persons under disability are enabled to contract for the sale of lands to promoters before the incorporation of railway companies incorporated under that Act, but not to convey the lands.

Tenants in tail.

A contract by a tenant in tail under the Lands Clauses Act bars the entail, notwithstanding that he is prohibited by Act of Parliament from barring or defeating his estate tail, unless the reversion is in the Crown: *Re Cuckfield Burial Board, Ex parte Earl of Abergavenny*, 19 Beav. 153. And now a contract by such tenant in tail, made under the Settled Land Act, 1882, would bind the Crown. See sect. 58 (2) of that Act.

Tenants for life.

An equitable tenant for life can, under this Act, contract to sell, but in such case the concurrence of the trustees is necessary effectually to convey the land: *Lippincott* v. *Smyth*, 29 L. J., Ch. 520. He can, of course, now contract to sell and convey under the Settled Land Act, 1882. A restraint on alienation is now inoperative to prevent a tenant for life from contracting to sell settled land (see Settled Land Act, 1882, s. 51); she can accordingly contract under that Act for the sale of property to a railway company as effectually as an absolute owner in fee. But by sect. 56 of that Act it is provided, that nothing in that Act shall prejudice any existing statutory powers. It would

company shall purchase for the purposes of the railway and works by the said ——— Railway Act, 18—, authorized to be

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therefore appear that the whole transaction may, if thought advisable, be carried through between a limited owner and a railway company, under the provisions of sect. 9 of the Lands Clauses Act, *e. g.* if a difficulty arises in fixing the price.

When the husband and wife are seised in right of the wife, yet she is seised in her own right within the meaning of this section: *Cooper* v. *Gostling*, 11 W. R. 931; 4 Giff. 499. Married women.

When the vendor's wife joins in the conveyance to release her dower, the deed should be acknowledged, where the purchase-money is fixed by agreement and paid over to the vendor; but if the amount is ascertained under the Act, neither acknowledgment nor the concurrence of the wife in the conveyance appear to be required: Frend & Ware, Rail. Prec. 218.

As to the several descriptions of guardians recognised by law, see tit. APPOINTMENT, *post*. Guardians.

It would seem that the guardians referred to in sect. 7 are such as have the custody, not only of the person of the infant, but also of his lands, *i. e.* testamentary guardians and guardians appointed by the Lord Chancellor, and probably also guardians in socage, by election, and by custom. See Frend & Ware, Rail. Prec. 237.

A committee cannot consent to an Act of Parliament for making a railway without the sanction of the Lord Chancellor: *Re Brown*, 1 M. & G. 201. The Court has authorized the committee to release lands taken under the Lands Clauses Act from a rent-charge upon purchase by the corporation of a government annuity of amount equal to the rent-charge: *Re Brewer*, 1 Ch. D. 409. Where no committee has been appointed, the company cannot safely complete without the sanction of the Court: *Midland Rail. Co.* v. *Oswin*, 3 Rail. Ca. 497. As to costs of reference to the master, and other claims before him, of necessary parties, see *Re Taylor*, 1 M. & G. 210; *Re Walker*, 7 Rail. Ca. 129; *Re Briscoe*, 2 De G., J. & S. 249. Lunatics.

The necessity for a lessor's licence to assign under a covenant to that effect in the lease is done away with by the Act: *Slipper* v. *Tottenham and Hampstead Junction Rail. Co.*, L. R., 4 Eq. 112. Lessees.

A lessee is liable to the lessor for breaches of covenants in the lease committed before an assignment to a railway company: *Mills* v. *East London Union*, L. R., 8 C. P. 79; but not afterwards: *Baily* v. *De Crespigny*, L. R., 4 Q. B. 180.

Sect. 9.]—The provisions of this section must generally be strictly observed. Two surveyors must be duly nominated, must meet and discuss the matter, and issue their certificate. Mere agreement between two surveyors not appointed as directed is not sufficient: *Wycombe Rail. Co.* v. *Donnington Hospital*, L. R., 1 Ch. 268. See, however, *Ex parte Rector of Adderley*, 10 L. T., N. S. 131. Where upon a petition by an incumbent for investment of purchase-money of land taken for a railway, the Court, being satisfied that future interests were adequately protected, made the order prayed for, although the amount had been fixed Sect. 9. Valuation.

IX. Sale of Land to Railway Company.

made and constructed, and other the works connected therewith, at the price of £———, ALL THOSE closes of land and hereditaments situate in the parish of ———, in the county of ———, and which premises are particularly described with their respective admeasurements in the schedule hereto annexed, and are also delineated and numbered ——— on the plans (*b*), and described in the book of reference thereto relating to the said railway, deposited by the company in the office of the clerk of the peace for the county of ———, at ———; TOGETHER with all mines and minerals (*c*) in and under the same premises, and the inheritance thereof in fee simple, free from incumbrances.

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by one surveyor nominated and acting for both parties. See also *Baker* v. *Metropolitan Rail. Co.*, 32 L. J., Ch. 7.

This section applies to compensation for injuriously affecting land not taken by the promoters, as well as to compensation for taking lands: *Stone* v. *Mayor, &c. of Yeovil* (C. A.), 2 C. P. D. 99.

Sect. 12. Extraordinary purposes.

Sect. 12.]—By sect. 45 of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), companies are authorized "to contract with any party willing to sell the same for the purchase of any land adjoining or near to the railway, not exceeding in the whole the prescribed number of acres for extraordinary purposes; (that is to say), for the purpose of making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, loading or unloading goods or cattle to be conveyed upon the railway, and for the erection of weighing machines, toll houses, offices, warehouses, and other buildings and conveniences: for the purpose of making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway."

Plans.

(*b*) Railway companies are not at liberty to proceed with the works until the plans of all the alterations authorized by Parliament have been deposited. See Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 8. As to how far the deposited plans and books of reference are binding on the company, see *North British Rail. Co.* v. *Tod*, 12 Cl. & F. 722; *Kemp* v. *West End of London, &c. Rail. Co.*, 1 K. & J. 681; *Reg.* v. *Caledonian Rail. Co.*, 16 Q. B. 19; *Re Corporation of Huddersfield*, L. R., 10 Ch. 92.

Mines, &c.

(*c*) By the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 77, "The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, except as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

Mines lying near the railway are not to be worked if the company is willing to purchase them (sect. 78); but if the company

IX. Sale of Land to Railway Company.

2. The said price of £——— shall include, and be in full satisfaction of and compensation for all mines and minerals, and for all damage caused by severing the lands and premises purchased from other property of the vendor, or by otherwise injuriously affecting such other property in the exercise of the powers of the said Acts, and in full satisfaction of all communications, bridges, culverts, drains, ways, passages, accommodation works (*d*) and things whatsoever which might otherwise be required to be made or done under any of the said Acts for the better enjoyment, protection, or accommodation of the vendor's adjoining or other property, and also all rights of preemption over surplus land.

Purchase-money to include compensation for mines, severance, &c.

3. The said price of £——— shall also include and be in full satisfaction of and compensation for all claims and demands whatsoever of the tenants or occupiers of the premises hereby agreed to be sold; PROVIDED always that the company shall give due notice to such tenants and occupiers to treat as provided by the said Acts, and shall deliver to the vendor all claims and demands sent in pursuant to the said notices, and the vendor shall be at liberty to settle with the said tenants and occupiers, upon such terms as may be mutually agreed between him and them with regard to their respective interests in the premises, and he shall indemnify the company from all claims and demands in respect of the premises.

Also for tenant's rights, &c.

4. The vendor hereby consents to such alterations of levels as may be found necessary or convenient in the construction of the said railway and works.

Alteration of levels.

5. The vendor shall, whenever thereunto required by the solicitors of the company in writing, deliver to them an abstract of title to the premises hereby agreed to be sold; but such abstract shall not commence at an earlier date than shall be required by them, and no costs or expenses shall be incurred

Delivery of abstract.

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are unwilling to purchase, the owner may work the mines (sect. 79). It is generally advisable that the company should purchase the mines along with the surface, whereby the necessity of paying compensation, under sect. 78, for leaving the mines unworked, and under sect. 81, for severance, &c., is avoided. See Frend & Ware, Rail. Prec. p. 21.

The term "mines" in a conveyance to a canal company was held to include quarries: *Midland Rail. Co.* v. *Checkley*, L. R., 4 Eq. 19; see also *Hent* v. *Gill*, L. R., 7 Ch. 699.

(*d*) As to accommodation works, *vide post*, p. 448.

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by the vendor in preparing the abstract or otherwise as to title, except upon the written request in that behalf of the said solicitors or of the secretary of the company.

Errors, &c.

6. If any error or omission shall be found as regards the admeasurements or descriptions of the premises, compensation on account thereof shall be paid or allowed by the vendor or the company, as the case may require.

Completion of purchase.

7. The purchase-money, together with all costs and expenses allowed by the said Acts or by this agreement, shall be paid to the vendor at the office of Messrs. ———, his solicitors, at ——— on the ——— day of ———, provided a good title to the premises shall then have been shown. The vendor and all other necessary parties, if any, shall thereupon make and execute all proper conveyances of the premises to the company, or as their said solicitors shall direct. Such conveyances shall contain the usual statutory acknowledgments by the vendor of the right of the company to all deeds and documents of the vendor relating to the premises agreed to be sold and retained by the vendor, and undertaking for the safe custody thereof.

Delivery of possession to the company.

8. The vendor shall up to the said ——— day of ———, 18—, retain possession of the premises or receive the rents and profits thereof, and shall pay all taxes, rates, and outgoings in respect thereof; and as from that day the possession shall be taken and the rents and profits shall be received and all taxes, rates and outgoings shall be paid by the company.

Power for company to take immediate possession.

9. Provided always that the company shall be at liberty to take immediate possession of the premises upon depositing the said price or sum of £———, in the ——— Bank in the joint names of the vendors and of C. D. on behalf of the company, where the same sum shall remain at the risk of the company until completion of the purchase, when the same shall be paid to the vendor or other persons entitled thereto, or otherwise into Court for his or their benefit as provided by the said Acts.

In such case company to pay interest on purchase-money.

10. If the company shall take immediate possession under the last preceding clause, the company shall pay interest on the purchase-money at the rate of £——— per cent. per annum on the amount of the purchase-money from the time of taking such possession until completion of the purchase, but shall be entitled to receive all interest allowed by the said bank upon the deposit of the purchase-money.

11. The fees of the vendor's surveyor amounting to £———, and all costs of the solicitors of the vendor up to and inclusive of the preparation and execution of this agreement, and of carrying the same into effect, shall be paid by the company.

Surveyor's fee and costs to be paid by the company (*e*).

As witness, &c.

The Schedule above referred to.

No. on Parliamentary Plan.	Description of Property.	Tenure.	Occupier.	Quantity. A. R. P.	Particulars of Incumbrances.

(*e*) The costs of conveyances, where lands are taken by agreement, are regulated by sect. 82 of the Lands Clauses Act, which provides that—"The costs of all such conveyances shall be borne by the promoters of the undertaking; and such costs shall include all charges and expenses incurred on the part as well of the settlor as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title." The more extensive obligations as to costs imposed by sect. 80, relate only to cases where land is taken compulsorily. The costs of preparation and execution of the contract should, therefore, be provided for by special stipulation. Costs.

It has been held that sect. 82 throws on the company the costs of preparing and verifying maps, schedules, &c., but not of ascertaining what the property to be conveyed is, nor of apportioning ground rents: *Re Hampstead Rail. Co., Ex parte Buck*, 1 H. & M. 519. The company must pay the costs of getting in a legal estate outstanding at the date of the contract: *Re Nash's Estate*, 4 W. R. 111; *Re Eastern Counties Rail. Co.*, 26 L. T. 176; also costs of obtaining administration *de bonis non* of a testator whose executor had died intestate: *Re Liverpool Improvement Act*, L. R., 5 Eq. 282. But the company is not liable for the costs of applications under the Trustee Acts rendered necessary by the devolution of the legal estate, owing to the death of a vendor, upon persons incompetent to convey: *Midland Rail. Co.* v. *Wescomb*, 2 Rail. Ca. 211; *London & S. W. Rail. Co.* v. *Bridger*, 12 W. R. 948; *S. C.*, 10 Jur., N. S. 654. See further, as to costs of proceedings necessary for completing the conveyance, Browne & Theobald, "Law of Railways," p. 209, and Shelford on Railways, vol. ii. p. 379.

X. *AGREEMENT with* PROMOTERS *of a* RAILWAY COMPANY *for sale of Land; Company to make* ACCOMMODATION *Works, and to* COMPENSATE *the Landowner for* DETERIORATION *in* VALUE *of his* PROPERTY *in consideration of his* WITHDRAWING OPPOSITION *to the passing of the* BILL.

AN AGREEMENT made the ——— day of ———, 18—, BETWEEN [*promoter*], of &c., and [*promoter*], of &c., being two of the promoters and members of the provisional committee of a company intended to be incorporated under the name of the ——— Railway Company (and who are hereinafter referred to as the promoters), on behalf of themselves and of all other proprietors of the said intended railway, of the one part, and [*landowner*], of &c. (and who is hereinafter referred to as the vendor), of the other part. WHEREAS a bill is now pending before the House of Commons for the purpose of incorporating the said ——— Railway Company, and empowering them to make a line of railway from ——— to ———, which, as at present marked out, passes for a distance of two miles or thereabouts through an estate of the vendor situate in the parishes of ———, and ———, in the county of ———: AND WHEREAS the vendor has signified his intention to the promoters to petition against the said bill, and to oppose the passing of the same into law: AND WHEREAS at the request of the promoters the vendor has consented to withdraw his opposition to the bill upon the terms and conditions hereinafter contained, and on the part of the promoters and of the said intended company, to be observed and performed: NOW THESE PRESENTS WITNESS, and it is hereby agreed and declared as follows, that is to say:—

Parties.

Recitals that bill for incorporating company is pending;

that intended railway passes through vendor's estate;

that vendor has petitioned against bill,

and consented to withdraw opposition on terms.

Operative part.

Interpretation clause.

1. In this agreement the term "vendor" includes the vendor, his heirs and assigns, and the term the "company" includes the intended ——— Railway Company, their successors and assigns.

Company to pay compensation for deterioration in value of the property:

2. If the company shall be incorporated by Act of Parliament in the present or any future session, and shall be empowered to enter upon and take any lands of the vendor situate in the parishes of ——— and ——— aforesaid respectively, for the purposes of the said railway, the company shall, within ——— weeks after the passing of such

X. Sale of Land to Promoters.

Act, and whether any portion of the lands of the vendor shall or shall not ultimately be taken by them, pay to the vendor the sum of £———, as compensation for any deterioration in the value of the property of the vendor, and for any annoyance to the vendor, or to the tenants and occupiers, for the time being, of the said estate, or any part thereof, which may happen or arise in case the said intended railway shall pass through or over the same.

To purchase land required at a fixed price per acre:

3. The company shall, before entering upon or taking possession of any part or parts of the said lands (except for the purpose of setting out the line of the said railway), pay to the vendor the further sums following, that is to say: the sum of £——— per acre, and after the same rate for every less quantity than an acre, for the purchase in fee simple in possession, free from incumbrances, of such of the lands of the vendor, situate in the said several parishes of ——— and ———, or either of them, as may be required by the company and be authorized to be taken by them for the purposes of the said railway: And also the sum of £——— per acre, and after the same rate for every less quantity than an acre of the lands purchased, and in full compensation and satisfaction (except as hereinafter mentioned) for all damage which by the severance of the same lands, or by the formation of the said railway or any works connected therewith, may be occasioned to the adjoining or other lands of the vendor.

To pay costs of deducing title, &c.:

4. The company shall pay all costs and expenses which shall be incurred by the vendor, in or about the deduction and verification of the title to the lands which shall be required and purchased by the company as aforesaid, and also the costs and expenses of or incidental to the preparation and execution of this agreement, and of all conveyances and assurances whatsoever, which be necessary for vesting the same lands in the company.

Not to erect buildings on vendor's land without consent:

5. The company shall not at any time hereafter make or erect any station, depôt, loading or unloading place, lime or brick kiln, steam engine, erection, or building whatsoever, upon any part of the said estate of the vendor, except such parts as shall then have been purchased by them, without having first obtained his consent in writing so to do: And the company shall, in the construction and maintenance of the said railway across or through the estate, do as little damage thereto as possible.

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To make accommodation works specified in schedule (*a*):

6. The company shall, within ——— months from the date of this agreement, at their own cost make and for ever after the making thereof maintain the several accommodation and other works specified in the schedule hereunto annexed for the accommodation of the vendor, and the company shall, on the completion of the purchase, enter into and execute a deed of agreement and covenant for the execution of such works (*b*).

To ratify this agreement after incorporation.

7. The company shall, at their own expense, within ——— days next after the passing of the said Act, by such instrument under their common seal, as the counsel of the vendor shall advise, adopt, ratify, and confirm this agreement in all respects; and in default thereof, and until such instrument shall have been so sealed, the promoters and each of them, their and each of their heirs, executors, and administrators, shall be jointly and severally and personally responsible to the vendor for the due observance and performance of these presents, and be liable in damages for the non-observance or non-performance of the same, or any part thereof, and so from time to time as such damages shall accrue.

(*a*) As to the construction by a railway company of works for the accommodation of lands adjoining the railway, see the Railways Clauses Act, 1845, sects. 68—76. Under this Act companies are to make and maintain, for the accommodation of the owners and occupiers of adjoining lands, necessary gates, bridges, and other communications, fences, drains, and watering places for cattle, but are not to be required to make such accommodation works where the owners or occupiers have agreed to accept compensation instead thereof. If, therefore, any part of the purchase-money is intended to be compensation instead of works, this should be expressly stated as in the preceding Precedent, *ante*, p. 443. The communications must be maintained by the company for the use of the occupiers of houses built on the lands subsequently to the construction of the railway: *United Land Co.* v. *Great Eastern Rail. Co.*, L. R., 10 Ch. 586. For a similar decision under an Enclosure Act, see *Finch* v. *Great Western Rail. Co.*, 5 Ex. D. 254. As to the liability of the company with regard to sufficiency of fences, and as to animals trespassing, see *Ricketts* v. *East and West India Docks, &c. Rail. Co.*, 12 C. B. 160; *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Wallis*, 14 C. B. 213; *Midland Rail. Co.* v. *Daykin*, 17 C. B. 126; *Buxton* v. *North Eastern Rail. Co.*, L. R., 3 Q. B. 549; *Dawson* v. *Midland Rail. Co.*, L. R., 8 Ex. 8; *Child* v. *Hearn*, L. R., 9 Ex. 176; *Wiseman* v. *Booker*, 3 C. P. D. 184. Accommodation works are not to be required after five years from the opening of the railway, and after that time no action will lie for damages in respect of insufficiency of the works: *Colley* v. *London and North Western Rail. Co.*, 5 Ex. D. 277.

(*b*) See Precedent XI., *post*, p. 450.

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8. The vendor shall not at any time hereafter petition against, or in any manner whatever, either directly or indirectly, oppose, or cause opposition to be raised to the making of the said projected railway from ——— to ———.

Vendor not to oppose the bill.

9. The vendor will accept from the said company the sum of £——— per acre for the purchase by them as aforesaid of such of the said lands of him the said vendor as may be required by the said company for the purposes of the said railway, and the said sum of £——— per acre as aforesaid, as compensation, or satisfaction for all such damage and injury as hereinbefore mentioned.

Vendor to accept price and compensation money at rate specified:

10. The vendor will, within ——— days next after notice in writing, signed by the secretary of the said company, and stating what lands, being part of the said estate, will be required for the purposes of the said railway, shall have been served upon him, the vendor, or left at his usual or last-known place of abode in England, make and deliver to the solicitors for the time being of the said company an abstract of the title of him, the vendor, to the lands in such notice mentioned or specified, and will by such abstract deduce and show a clear and marketable title to the same lands and the appurtenances thereto belonging.

to deliver abstract of title when required:

11. On payment by the said company of the purchase and compensation money to be paid by them pursuant to these presents, for and in respect of any lands, parcel of the said estate, which they may require for the purposes of the said railway, the vendor and all other necessary parties (if any) will execute all such conveyances and assurances for the purpose of conveying the same lands, and the fee simple and inheritance thereof in possession, free from incumbrances, to the company, as shall be required by the solicitors or counsel of the company.

to convey lands required to company.

12. Nothing herein contained shall in anywise operate to bind or compel the vendor to compensate out of his own moneys any tenant or occupier who now holds or occupies the lands which may be required and purchased by the company as aforesaid, or any part thereof; but any such tenant or occupier shall be paid such compensation as he may be entitled to by the company.

Stipulation as to compensation of tenants.

13. Nothing herein contained shall be construed to prevent or restrict the vendor as owner of lands adjoining the said railway from availing himself of the benefit of any provisions

Stipulation as to liability of company to

X. Sale of Land to Promoters.

contained or to be contained in the act of incorporation of the company, or any act incorporated therewith, requiring the company to make and maintain proper and sufficient works for the accommodation of the owners and occupiers of lands adjoining the said railway.

make further accommodation works.

As WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

[*Describe accommodation works.*]

XI. *DEED OF AGREEMENT by a Railway Company to execute* WORKS *for the* ACCOMMODATION *of the Owner of Lands adjoining the Railway.*

THIS INDENTURE made the ——— day of ———, 18—, BETWEEN the X. and Y. Railway Company of the one part, and A. B., of &c. of the other part: WHEREAS the owner is seised of or otherwise entitled for an estate in fee simple in possession to (amongst other hereditaments) the several pieces of land and hereditaments described in the schedule hereunder written, and which being required by the company for the purposes of their works were recently agreed to be purchased by them free from incumbrances at the price of £———: AND WHEREAS by an indenture bearing even date with, but to be executed after, this agreement the said pieces of land and premises are intended to be conveyed unto and to the use of the company their successors and assigns: AND WHEREAS upon the treaty for the said purchase it was agreed that the company should make the payments and execute the several accommodation and other works hereinafter mentioned respectively, and should enter into the stipulations hereinafter contained and on their part to be observed and performed: NOW THIS INDENTURE WITNESSETH, and it is hereby agreed and declared, and the company do hereby for themselves, their successors and assigns (so far as relates to the stipulations on their part to be observed and performed) covenant with the owner in manner following, that is to say:

Parties.

Recitals; of agreement for sale of lands to company:

of conveyance to company;

of agreement to execute works, &c.

Interpretation clause.

1. In this agreement the term "owner" includes the owner and his heirs and assigns, and the term "the company" includes the X. and Y. Railway Company and their successors and assigns.

XI. Agreement for Accommodation Works.

2. The company shall previously to the opening for traffic of the said intended railway or any part thereof, make and for ever after the making thereof, maintain fit for the convenient passage thereover respectively of agricultural waggons and carriages, such roadways or paths each of the width of ten feet at the least, with such culverts and works thereunder respectively as are next hereinafter mentioned or referred to [*describe these works in detail*]: And also shall at their own cost make, and for ever maintain in good and sufficient repair and condition, suitable gates, each of sufficient width for the passage of agricultural waggons and carriages, over or upon all the several roadways or paths hereinbefore mentioned: and also shall at the like cost make, and in like manner maintain in good and sufficient repair, culverts, tunnels, and other necessary works under the said several roadways or paths, so as that the same respectively shall not in any way interfere with, hinder or obstruct the free passage of water through the said several drains or ditches over which the same roadways or paths shall respectively pass as aforesaid.

To make and maintain roads, gates and culverts.

3. The company shall make, and for ever after the making thereof, maintain and keep open two main drains to be made parallel with and adjoining to the said intended railway, the one on the eastern and the other on the western side thereof, so that an effectual watercourse may be maintained and continued along the said intended railway for such distance as the same shall pass through or adjoin upon lands belonging to the owners.

To make and maintain drains.

4. The company shall make, and for ever after the making thereof respectively maintain, and keep in good repair for the purpose of carrying off the water from such of the lands lying adjacent to the said pieces or parcels of land described or referred to in the said schedule to these presents, as are situate on the eastern side of the said intended railway a circular tunnel under the same railway of the width or diameter throughout of ——— feet at the least, to run between the pieces of land first and secondly described in the said schedule, and to be in the same position and direction as nearly as circumstances will permit as is the drain or ditch which now separates the same pieces of land respectively the one from the other, which position and direction are delineated

To make and maintain tunnels.

XI. Agreement for Accommodation Works.

in the plan drawn in the margin of these presents by a line or mark coloured blue.

To make and maintain crossings.

5. The company shall make, and for ever after the making thereof, respectively repair and maintain fit for use and suitable for the passage thereover respectively of agricultural waggons and carriages, the several passages or crossings, each of the width of ten feet, over or across the said intended railway and the works thereof next hereinafter mentioned (that is to say,) First, one such passage or crossing over or upon the piece of land firstly described in the schedule hereunder written, at the northern end thereof and immediately adjoining to the station which is intended to be erected and built by the said company on land lying on the eastern side of the same piece of land, which said passage or crossing is delineated in the said plan drawn in the margin of these presents by a line coloured red [*describe in a similar manner the other crossings*].

The company not compellable to make further accommodation works.

6. The company shall not, by reason of the purchase by them of the pieces of land and hereditaments respectively described in the said schedule hereunder written, be liable or compellable by virtue of the Railways Clauses Consolidation Act, 1845, or otherwise howsoever, to make, construct, or erect for the accommodation of the owner any works whatsoever, other than those hereinbefore agreed to be made by them.

How works to be completed.

7. All the works hereinbefore agreed to be made by the company shall be executed by them and at their own cost, to the satisfaction of Mr. ———, of &c., or other the surveyor for the time being of the owner, and shall be completed within ——— months from the date of this agreement.

As witness, &c.

The Schedule above referred to.

XII. *AGREEMENT for the* SALE *of* LAND *to be made under the* DIRECTION *of the* COURT.

AN AGREEMENT made the ——— day of ———, 18—, BETWEEN [*vendor*] of &c. (hereinafter referred to as the vendor), of the one part [*purchasing trustee*], of &c., and [*purchasing trustee*], of &c. (who are hereinafter referred to as the purchasers), of the second part; and [*a party whose consent is required*], of &c., of the third part; WHEREBY it is agreed (subject to this agreement, and to the title to the mansion and hereditaments hereinafter described, being approved by the Chancery Division of the High Court of Justice in the now pending suit of [*plaintiff*] v. [*defendant*] in manner hereinafter provided) as follows:— Parties.

1. The vendor will sell and the purchasers will, with the consent of the said [*consenting party*] testified by his executing this agreement, purchase for the sum of £——— the fee simple in possession free from incumbrances (except as herein appears) of and in ALL THAT piece of ground (formerly part of the gardens or land of ———), situate in the parish of ———, in the county of ———; TOGETHER with the mansion and offices erected thereon, known as———, and all lands and appurtenances usually occupied with the said mansion and offices, but subject to the stipulations hereinafter contained. Agreement for sale and purchase subject to approval of Court.

2. The purchasers shall forthwith, and at their own cost, as between vendors and purchasers, use their best endeavours to obtain in the said suit, with all practicable speed, the approval of the said Court of this agreement, subject to a good title being shown to the said premises in accordance with the stipulations hereinafter contained, and shall, in the event of such approval being obtained, forthwith communicate in writing to the vendor, or his solicitors ——— , the fact of such approval having been obtained. Purchasers to obtain sanction of Court to sale.

3. The vendor shall within ——— days from the notification of the fact that the approval of the Court of this agreement has been obtained, subject as aforesaid, deliver to the purchasers, or their solicitors, an abstract of his title to the premises subject to the stipulation herein contained. Delivery of abstract.

4. The purchasers shall, with all practicable speed after the actual delivery of the abstract, deliver at the offices of ———, in writing, their objections and requisitions (if any) in respect Delivery of requisitions under direction of the Court.

XII. Sale of Land under Direction of Court.

of the title, and in making such objections and requisitions the purchasers shall act under the direction of the Court, and upon such delivery the title is to be considered as approved and accepted by the purchasers, subject only to such objections and requisitions (if any).

5. If the purchasers, acting under the direction of the Court, shall insist on any objection or requisition which the vendor shall consider himself unable, or shall on the ground of expense, or for any other reason, decline to remove or comply with, the vendor shall, notwithstanding any intermediate negotiation, be at liberty by writing signed by his solicitors, to rescind the contract, and shall not be required to pay to the purchasers any costs of investigating the title, or other compensation or payment whatever.

Stipulations as to commencement of title, &c.

6. The said piece of ground and premises hereby agreed to be sold were by indenture of lease dated the ——— day of ———, 18—, demised by [*lessor*] to [*lessee*] for a term of ——— years at the yearly rent of £———, and under the covenants and agreements therein contained. The residue of this term, and also the reversion and inheritance in fee simple expectant thereon, and subject thereto, were in the year 18—, purchased by and assured to ———, and the said term is considered to have merged. The abstracts of title shall therefore commence as follows, viz.,— as respects the ——— year's term with the indenture of lease above referred to, and as respects the reversion in fee, subject to the term, the vendor shall not be required to abstract or produce any deed or will earlier in date than an indenture of bargain and sale dated the ——— day of ———, making the tenant to the præcipe in a recovery suffered in ——— pursuant to a covenant in an indenture dated ———, which will also be abstracted, and as respects certain family charges which formerly affected the property, the vendor shall not be required to abstract or produce any deed or will earlier in date than certain deeds dated in the year ———, by which the said charges were released or merged; but the purchaser (acting under the direction of the Court), shall nevertheless be entitled to decline to accept the title, unless such document of title earlier in date than the said indentures of bargain and sale, as the Court shall direct, are abstracted and produced.

As to non-production of original deeds, &c.

7. No objection or requisition shall be made in respect of the non-production of the original or an attested or other copy

of any instrument enrolled for safe custody and accessible to the purchasers.

8. As respects any deed, will, or other document which may not have been registered or properly registered in the county register, the same shall (if practicable) be registered, or re-registered at the request of the purchasers. The purchasers shall pay the said purchase-money of £——— on the ——— day of ——— next at the office of Messrs. ——— aforesaid, and the purchase shall then and there be completed. As to registration.

9. Upon payment of the said purchase-money of £———, and of all interest (if any) due thereon, the vendor and all other necessary parties (if any) will execute a conveyance in fee simple of the hereditaments hereby agreed to be sold to such person or persons as the purchasers shall direct; the said conveyance to be prepared by and at the expense of the purchasers. Execution of conveyance.

10. If from any cause whatever other than the wilful default of the vendor the purchase shall not be completed on or before the said ——— day of ———, 18—, the purchasers shall pay interest on the said sum of £——— from that day until completion of the purchase at the rate of £——— per cent. per annum (whether their money be lying unemployed or not), but without prejudice to the vendor's other rights and remedies under this agreement. Purchaser to pay interest.

11. The purchasers shall on completion of the purchase be let into vacant possession of the said premises, and from the said ——— day of ———, 18—, all rates, taxes, and other outgoings in respect thereof shall be paid by them. Delivery of possession.

12. As respects muniments of title retained by former owners, the purchaser shall be satisfied with the subsisting qualified covenants for their production. As respects muniments of title in the custody of the vendor or any party claiming under him, the vendor, or other the holder of the deeds, will not deliver up the same to the purchasers, but will give the usual statutory acknowledgment of the purchasers' right to their production and to delivery of copies thereof, and also the usual statutory undertaking for safe custody thereof. As to custody and production of deeds, &c.

13. If the purchasers shall fail to obtain the approval of the Court to this agreement, and to the title to the said premises on or before the ——— day of ———, 18—, or on or before such later date as shall be agreed upon in writing, this agreement shall be void. Unless approval of Court obtained, contract to be void.

XII. Sale of Land under Direction of Court.

If purchasers fail to comply with stipulations, vendor may rescind and re-sell.

14. If the purchasers shall fail to comply with the above conditions, the vendor shall be at liberty to resell the property at such time, in such manner and subject to such conditions as the vendor shall think fit, and any deficiency in price which may happen on and all expenses attending the resale, shall immediately afterwards be paid by the said ——— to the vendor, and in case of non-payment shall be recoverable from him by the vendor as and for liquidated damages.

As WITNESS, &c.

XIII. *AGREEMENT for a* BUILDING GRANT *in consideration of a perpetual* RENT-CHARGE.

AN AGREEMENT made the ——— day of ——— 18—,

Parties.

BETWEEN [*grantor*], of &c. (hereinafter referred to as the grantor) of the one part, and [*grantee*], of &c. (hereinafter referred to as the grantee), of the other part. WHEREBY it is agreed and declared as follows that is to say:—

Agreement for sale and purchase.

1. The grantor shall sell, and the grantee shall purchase, all that piece or parcel of land [*describe parcels*] (all mines and minerals being excepted out of the premises and reserved to the grantor) in fee simple in possession, free from incumbrances at the price, and in consideration of a rent-charge of £——— per annum, to be chargeable upon and issuing out of the said premises, and to be payable half-yearly on the ——— day of ———, and the ——— day of ———, in every year, and the first half-yearly payment to be made on the ——— day of ——— next.

Title.

2. The grantee has examined and is satisfied with the grantor's title to the premises, and hereby accepts the same.

Possession.

3. The grantee shall be at liberty to take possession of the premises immediately after the execution of this agreement for the purpose of erecting and executing the buildings and works hereby agreed to be made.

Grantee to fence off building land;

4. Within one month from the date of this agreement the grantee will at his own cost sufficiently fence off the premises hereby agreed to be purchased by him, so as to protect the adjoining land from trespass and damage, with a substantial wood paling or with a brick wall at least nine inches thick, to the satisfaction of the grantor, or his architect or surveyor for the time being.

XIII. For Building Grant.

5. Within ——— years from the date of this agreement the grantee shall at the like cost erect and complete on the said premises good and substantial messuages or dwelling houses at the cost of £——— at the least for each messuage or dwelling house with its appurtenances; and all such messuages or dwelling houses shall be built of solid brick or stone, with roofs of the best slate or ornamental tiles, and shall have suitable gardens, outbuildings, and offices attached thereto, and proper drains and sewers connected therewith; and each such messuage or dwelling house and its appurtenances shall be constructed of good well-seasoned and proper materials of all kinds, and to be well and sufficiently fenced off as aforesaid from the adjoining premises; and all such messuages, buildings, and works shall be erected, contracted, and executed according to plans, elevations, and specifications to be previously approved by the architect or surveyor for the time being of the grantor, and shall be carried out and completed under the inspection and to the satisfaction in all respects of such architect or surveyor.

to erect dwelling-houses;

6. The grantee shall be at liberty to make, open and lay out such roads, streets and approaches in, through, over, or upon the said premises hereby agreed to be purchased by him as he shall think proper or advantageous, the plans of all such proposed roads, streets, and approaches being first submitted to and approved of by the architect or surveyor for the time being of the grantor; PROVIDED always that all such roads, streets, and approaches, and the drains and sewers to be connected with the messuages to be built as aforesaid, shall be completed within ——— years from the date of this agreement, to the satisfaction in all respects of such architect or surveyor as aforesaid.

to make streets, &c.

7. When and so soon as any plans or elevations of the said messuages, buildings and works hereby agreed or authorized to be erected, constructed, and executed, shall have been approved by the architect or surveyor for the time being of the grantor, the grantee shall at his own cost cause good and accurate copies or tracings thereof to be deposited with such architect or surveyors, and no messuage, building, or work whatever shall be erected, constructed, or executed by the grantee upon the premises hereby agreed to be purchased by him, or upon any part thereof, except only in accordance and conformity with the stipulations and provisions herein con-

To deposit copies of plans.

XIII. For Building Grant.

tained respecting the erection, construction, and execution of the messuages, buildings, and works hereby agreed or authorized to be erected, constructed, and executed on the said premises.

Conveyance.

8. When and so soon as the architect or surveyor for the time being of the grantor shall certify in writing that the said messuages, buildings, and works, hereby agreed to be erected, constructed, and executed, have been completed to his satisfaction the grantor shall make and execute to the grantee, and the grantee shall accept a grant or conveyance of the premises hereby agreed to be purchased, and the grantee shall also execute a counterpart thereof; such grant or conveyance, and the counterpart thereof, shall be prepared by the solicitors of the grantor at the cost of the grantee.

Contents of conveyance.

9. The said grant or conveyance shall be made to the uses following, that is to say:—to the use that the grantor, his heirs and assigns, may, as from the date of the execution of this agreement, receive a clear rent-charge of £——— per annum, to be payable at the times and in manner aforesaid, and subject to and charged with the said rent-charge, and the usual powers and remedies for enforcing payment thereof to the use of the grantee in fee-simple; and shall also contain the following covenants by the grantee, that is to say:—to pay the said yearly rent-charge clear of all deductions; to allow the grantor to get, and work, and carry away the mines and minerals in and under the premises hereby agreed to be purchased, the grantor making compensation for damage occasioned thereby; to keep the said messuages and buildings hereby agreed to be erected and constructed in good and tenantable repair and condition, and insured against loss or damage by fire in some public insurance office to be approved by the grantor in a sum not less than two-thirds of the value thereof; and to produce the policies and receipts for payment of the last premium to the grantor on demand; and not to use, nor permit to be used, without the previous consent in writing of the grantor, his heirs or assigns, any of the said messuages or buildings for any purpose whatever, except as a private dwelling-house, nor to alter, nor permit to be altered, without such consent as aforesaid the plan or elevation of any of the said messuages or buildings; nor to erect, construct, or execute without such consent as aforesaid, on the premises hereby agreed to be purchased, or any part thereof, any other

XIII. For Building Grant.

messuage, building or work, other than such as are hereinbefore agreed or authorized to be erected, constructed, and executed: And shall also contain a power or proviso for re-entry by the grantor, his heirs and assigns, in case the said rent-charge, or any part thereof, shall fall ——— months in arrear, or in case the grantee shall fail to observe and perform the covenants to be contained in the said grant or conveyance, and on his part to be observed and performed.

If grantee shall fail to perform stipulations, grantor may re-enter.

10. If the said yearly rent-charge, or any part thereof, shall at any time before the execution of the said grant or conveyance, be in arrear and unpaid for ——— weeks after any of the days hereinbefore appointed for payment of the same, or if the grantee shall not within the time, and in manner aforesaid, complete the said messuages, buildings, and works hereby agreed to be erected, constructed, and executed, or shall for ——— weeks discontinue the erection, construction, or execution of the same respectively, or shall fail to carry out into complete effect the agreements herein contained, then, and in any such case it shall be lawful for the grantor at any time thereafter to re-enter upon the said premises and take possession of the same, and of all buildings and materials erected and being thereon, and thereupon this agreement shall become absolutely void.

11. [*Arbitration clause, post*, p. 546.]

As witness, &c.

XIV. *AGREEMENT for the* Sale *of the Right of Patronage of an* Advowson (*a*), *in fee for Life or for Years.*

ARTICLES OF AGREEMENT, made the ——— day of ———, Between A. B., of &c. (hereinafter referred to as Parties.

(*a*) Originally all advowsons in the hands of lay patrons appear to have been donative, the patron conferring the church and all the temporalities annexed, by investiture, without the necessity of any institution by the bishop. The clerk was not *presented* to the bishop, but was at once invested with the temporalities by the patron. After the church became vacant, and until the patron chose to fill it, he took the profits of the benefice to his own use, and on his death they went to his heir,

Distinction between donative and presentative advowsons.

XIV. Sale of Advowson.

the vendor), of the one part, and C. D., of &c. (hereinafter referred to as the purchaser), of the other part.

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there being no direct means of compelling him to fill the vacancy, but only ecclesiastical censures. See *Fairchild* v. *Gaire*, Yelv. 61; *S. C.*, Cro. Jac. 63; *Britton* v. *Ward*, 2 Roll. Rep. 97; Mallory, *Quare impedit*, 35. After a long struggle, the church succeeded (about the beginning of the thirteenth century), in establishing almost universally throughout England the course of filling parochial churches by presentation to the bishop, when the practice of investiture by the lay patron was consequently discontinued: Selden, Hist. Tithes, c. 12, s. 5.

Lapse.

At the same time the doctrine of lapse was introduced, which entitled the ordinary to collate a clerk to the benefice, if the patron neglected to present one within six months from the happening of the vacancy. But some donatives survived the introduction of presentation and institution, or were so created by the crown, or were so established by their founders; and to these the law of lapse did not apply, but the patron still enjoyed the profits during a vacancy, and might at any time take back the benefice by resignation from the incumbent. See the learned judgment of *Littledale*, J., in *Rennell* v. *Bishop of Lincoln*, 9 Dowl. & Ry. 810; *S. C.*, 7 B. & Cr. 113. "If the founder ordain that he and his heirs shall present them, the ordinary shall have nothing to do with it:" Year Book, 6 Hen. 7, c. 14. Free chapels donative are of this nature: see Brooks, Ab. *Presentment al Esglise*. Lord *Coke's* account of the matter is, that a church parochial may be donative and exempt from all ordinary jurisdiction, and the incumbent may resign to the patron, and not to the ordinary, neither can the ordinary visit, but the patron, by commissioners to be appointed by him. And so it is of a prebend, charity, chapel donative and the like, and no lapse shall incur to the ordinary, except it be so specially provided in the foundation.

Extinguishment of donative.

But if the patron do once present to the ordinary, and his clerk is admitted and instituted, it becomes presentable, and shall never be donative after, and then lapse shall incur to the ordinary. "At first," adds Lord *Coke*, "all the bishoprics in England were donative, and King Henry the First, being requested by the Bishop of Rome to make them elective, refused it; but King John, by his charter, granted that the bishoprics should be eligible. If the king found a church, hospital or free chapel donative, he may exempt the same from ordinary jurisdiction, and then his chancellor shall visit the same. So he may by his charter license any subject to found such a church or chapel, and to ordain that it shall be donative and not presentable, and to be visited by the founder and not by the ordinary. And thus began donatives in England, whereof common persons were patrons:" Co. Litt. 344 a. See *Shirt* v. *Carr*, 2 Br. P. C. 173; *Dixon* v. *Metcalf*, 2 Eden, 360; *S. C.*, *nom. Dixon* v. *Kershaw*, Ambl. 528.

Advowsons collative.

Besides the distinction of advowsons into presentative and donative, there is a third division dependent, not on the nature of the advowson itself, but on the situation of the owner, which

XIV. Sale of Advowson.

1. The vendor agrees to sell, and the purchaser agrees to purchase, ALL THAT the advowson, and perpetual right of

Agreement for sale and purchase.

is that of advowsons *collative*. When the advowson or the right of appointment for the time is in a bishop, as he cannot present to himself, he combines all in one act of collating or conferring the benefice: 2 Blackst. Com. 22.

Advowsons appendant and in gross.

An advowson is *appendant* when it is annexed to a manor, *in gross* when it is either severed from a manor, or originally had no connection with any manor, as where a person builds and endows a church and becomes patron of the benefice: Mirehouse, Adv. 13. If an appendant advowson be granted away for a partial estate, it becomes again appendant on the failure of that estate: *Finch's case*, 6 Rep. 39 a; *Hartop* v. *Cock*, Hutt. 88; Dyer, 259; Wats. Cl. Comp., *Incumb.* 69; *Bishop of Meath* v. *Marquis of Winchester*, 3 Scott, 561. But an advowson may be appendant to land merely, as well as to a manor; as, where the lord of a manor conveys land, parcel of a manor, with the advowson, the advowson will then be appendant to the land. An advowson appendant passes as an appurtenance, with that to which it belongs, although not named: see *Earl of Albermarle* v. *Rogers*, 2 Ves. jun. 477. But, upon a grant from the crown of a manor, with the appurtenances, an advowson will not pass, unless named: Stat. *de prærogativâ regis*, 17 Edw. 2, stat. 1, c. 15; Bac. Ab. *prærog.* (F. 2.); Hargr. Co. Litt. 121 b, n. 2; *Whistler's case*, 10 Rep. 63; *Willion* v. *Berkley*, 1 Plowd. 223; *Chancellor of Cambridge* v. *Walgrave*, 1 Hob. 126; *Attorney-Gen.* v. *Sitwell*, 1 Y. & C. Ex. 559. If the owner of a manor, with an advowson appendant, is disseised, he shall present to the church, though it falls vacant during the disseisin: Fitzh. N. B. 33, Q.

Grant from the crown will not pass on advowson appendant, unless named.

Disseisin.

Upon the appropriation of rectories by ecclesiastical corporations, and the endowment of vicarages, the advowsons of the vicarage became appendant to the rectory, subject, of course, to future separation: *Anon.*, Dyer, 350 b.; *Shirley* v. *Underhill*, Moore, 894; Hob. 327. An advowson of a vicarage may be appendant to a rectory as being derived and endowed out of the same: Phil. Eccl. Law, 333; or it may be appendant to a manor as attached to a rectory which is itself appendant to the manor, or by a presumed grant by the rector time out of mind: Mirehouse, Adv. 9.

Advowson of a vicarage appendant.

As to perpetual curacies, see *Arthington* v. *Bishop of Chester*, 1 H. Bl. 418; *Faulkner* v. *Elzer* or *Elger*, 6 D. & Ry. 517; *S. C.*, 4 B. & Cr. 449; *Farnworth* v. *Bishop of Chester*, 7 D. & Ry. 96; *S. C.*, 4 B. & Cr. 555; *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 93; *Doe* d. *Richardson* v. *Thomas*, 9 Ad. & El. 556.

Perpetual curacies.

An ecclesiastical patron of a presentative or collative living may grant his patronage; and his grant is good for his own time. See 7 Bligh, 282, 288; but it must be expressly described, and did not, it was said, pass under a demise, by a prebendary, by the words, "commodities, emoluments, profits, and advantages to the prebend belonging;" because those words implied things gainful, which is contrary to the nature

Alienation of advowsons by spiritual patrons.

XIV. Sale of Advowson.

Parcels.

ADVOWSON.

patronage and presentation of, and to the rectory and parish church of ———, in the county of ———, and in the diocese of ———, and of the fee-simple and inheritance thereof (*b*), free from incumbrances (*c*), at or for the price or sum of £———.

To deliver abstract.

2. The vendor will deliver unto the purchaser, within ——— days from the date hereof, an abstract of the title (*d*)

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of an advowson: *London* v. *Collegiate Church of Southwell*, Hob. 303.

Creditor's remedy against advowsons.

An advowson is not extendible; but, under the stat. 1 & 2 Vict. c. 110, s. 13, may be sold by a judgment creditor.

FOR LIFE.

(*b*) If for life, say,

"for the natural life of the said [*purchaser*], (*or* [*nominee*], of &c.)."

FOR LIVES.

If for lives, say,

"for the lives and life of [*nominees*], of &c., and the survivors and survivor of them."

FOR YEARS.

If for years, say,

"for the term of ——— years from the date hereof."

FOR YEARS DETERMINABLE ON LIVES.

If for years determinable on lives, say,

"for the term of ——— years from the date hereof, if the said [*purchaser*] (*or* [*nominee*], of &c.), should so long live."

(*c*) A mortgage of the living to the governors of Queen Anne's Bounty was held to be a charge on the living only, and not on the advowson, and a purchaser who discovered the existence of such a mortgage before completion was compelled specifically to perform his contract without compensation, there being no fraud on the part of the vendor: *Edwards-Wood* v. *Majoribanks*, 7 H. L. C. 806.

(*d*) The title to an advowson should be carried back at least 60 years, or for such longer period, not exceeding 100 years, as shall comprise three successive incumbencies, (in which number presentations by the crown on the promotion of an incumbent are not to be reckoned) and should be accompanied by a list of the successive presentations during that period, *ante*, p. 58. Where the advowson appears to be appendant to a manor, a mere sixty years' title is usually, but perhaps without much reason, considered sufficient. As the Vendor and Purchaser Act, 1874, does not contain any definition of land, it is not clear that an advowson is within that Act; it will therefore be prudent to stipulate expressly as in the text that recitals, &c. shall be evidence. For the meaning of land generally in Acts of Parliament, see stat. 13 & 14 Vict. c. 21, s. 4. An advowson is within the definitions contained in the Conveyancing and Law of Property Act, 1881, and the Settled Land Act, 1882.

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of the said vendor to the said advowson, such abstract to commence with, &c., and also extracts certified by the registrar of the Bishop of ———, of all the successive presentations to the said rectory since the ——— day of ——— 17—, [*the commencement of title*]. All recitals, statements, and descriptions contained in any document dated twenty years or upwards before the date of this agreement, shall be conclusive evidence of the facts and matters therein recited, stated, or described or thereby implied respectively.

3. [*Delivery of requisitions, ante*, p. 403.]

4. [*Requisitions insisted on to entitle vendor to rescind, ante*, p. 404.]

Completion of purchase.

5. The purchaser shall on the ——— day of ———, pay the purchase-money at the office of Messrs. ———, the vendors' solicitors, at ———, and the purchase shall then and there be completed. On payment of the purchase-money as aforesaid, the vendor and all other necessary parties (*e*), shall convey and assure the said advowson, with the appurtenances, unto the purchaser (*f*), or as he shall direct. The conveyance or assurance shall be prepared by and at the expense of the purchaser, and shall be left not less than ——— days before the said ——— day of ——— for the approval of the said solicitors of the vendor.

Delivery of attested copies of title deeds, and acknowledgment of right to originals (*g*).

6. The vendor shall, on the execution of the said conveyance, at his own charges, deliver unto the purchaser true and attested copies of all deeds, evidences, and writings, concerning the said advowson; And in the said conveyance enter into the usual acknowledgment of the right of the purchaser to the production of the originals, and undertaking for their safe custody, and to permit the said

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Dower and curtesy of an advowson.

(*e*) A husband is tenant by the curtesy of an advowson, though the church was not void during the marriage: Co. Litt. 29, a; Perk. s. 468; and a woman is dowable of an advowson in gross or appendant: Cro. Jac. 621.

FOR LIFE OR LIVES. FOR YEARS.

(*f*) "for his life (*or* unto the said [*purchaser*], his heirs and assigns, for the life of the said [*nominee*],) (*or* for the lives and life of the said [*nominees*], and the survivors or survivor of them), (*or* unto the said [*purchaser*], for the said term of ——— years, determinable as aforesaid)."

Deeds relate to property of greater value.

(*g*) This clause will be used where the deeds relate to other property of greater value than the advowson, or where for any other reason they are retained by the vendor.

XIV. Sale of Advowson.

purchaser to have any fresh copies thereof respectively from time to time, at his own expense.

In case of incumbent's death before conveyance, purchaser to nominate next incumbent.

7. In case of the decease, cession, deprivation, or relinquishment of the present incumbent of the said advowson, before the said ——— day of ———, the vendor shall duly present such person to the said advowson, as the purchaser shall nominate (*h*); but if the presentation to the said

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Right of presentation on promotion of clergymen to bishoprics.

(*h*) Upon the promotion of any spiritual person to a bishopric, whether in England or in the Isle of Man, all the benefices or dignities, except donatives, which he was possessed of before such promotion, are void upon his consecration, and upon his confirmation in case of translation; and the crown is entitled for that turn to present to them in right of the royal prerogative, although the advowson belongs to a common person: Wood's Inst. 37, 10th ed.; 3 Com. Dig. 198, *Esglise* (H. 6); Burn's Eccl. Law, 9th ed. 141, 212. But the right must be exercised in the lifetime of the person promoted: *Archbishop of Armagh* v. *Attorney-General*, 2 Br. P. C. 514.

Commendam retinere.

But the bishop might formerly prevent the avoidance by dispensation of retainer of such benefices as he had, if obtained before his consecration, or confirmation of his election; which was commonly called a *commendam retinere*, and was usually granted by the Archbishop of Canterbury, according to the statute 25 Hen. 8, c. 21, upon the king's mandate expressing his consent to it, as the true patron of the benefice for that turn; and it seems that by a *commendam* for life, and for the time of continuing in the bishopric, the turn of the crown was answered, and in such a case the proper patron presented upon the death or translation; but that the right of the crown was not defeated by a *commendam* granted for a term of months or years certain and limited: Gibson's Codex, 763, 913, 914, 915, 2nd ed. And see the great case of *commendam*, *Colt & Glover* v. *The Bishop of Coventry and Lichfield*, Hob. 140. But after the passing of stat. 6 & 7 Will. 4, c. 77, s. 19, no benefice can be held in *commendam*; see also 1 & 2 Vict. c. 106, and 13 & 14 Vict. c. 98.

But it seems the crown had not this prerogative anciently.

The right of presentation on promotion, however, appears to have been an usurpation of the crown, and anciently the law was taken to be, that the rightful patron ought to present; and, as Levinz says, there is little or no reason that the king should present, because he has promoted the parson; for the church is the patron's church, and it is reasonable he should have the presentation of a parson thereto (under whom he and his tenants and servants are to live), whose manners, doctrine, religion, and conversation ought to be such as he shall approve; and, by the same reason, if the king promote my chaplain of my family, or my bailiff, or other servant, he may impose another upon me. That anciently the king had no such prerogative is clear—(1) because no mention is made of any such prerogative either in the king or the pope, as certainly there would have been if any such thing had then been: (2) there is no mention of it in the stat. *de prærogativâ Regis*,

advowson should devolve on the crown, in consequence of the present or any succeeding incumbent being promoted to a

If incumbent be made a

17 Edw. 2, st. 1, which for the most part is but a sum or collection of certain prerogatives that were known law long before; nor in Stamford's Treatise upon that statute (see particularly cap. 8): (3) and the 5 Edw. 2, 148, in the book published by Serjt. Maynard, it appears that Hugh de Courtney brought a *Quare impedit* and counts, that the Countess of Albemarle was seised, and presented a clerk, who was made a bishop, and so derives a title to the plaintiff to present; but there is no mention of the king's prerogative, or any presentment by him upon the parson's promotion to the bishopric: (4) nor is any such thing mentioned in any of our ancient books, as Glanville, Bracton, Britton, Fleta, Doctor and Student (see particularly Dial. 2, c. 36, 37, pp. 218, 220, 18th ed.), &c.; and it has been denied to be law, as in Dyer, 228, b.; 3 Lev. 378.

The king's prerogative right to present is now clearly established.

But the king's prerogative in such cases has been favoured since, and the law has now been settled, however repugnant to reason, as Dr. Watson says (Clergyman's Law, 74, 4th ed. cap. 9), that the king shall present upon such an avoidance: *Wright's case*, Moore, 399; *Edes* v. *Bishop of Oxford*, Vaughan, 19; *Rex* v. *Episcop. Londin.*, 3 Lev. 377; 1 Ld. Raym. 23; Holt, 586; Salk. 540; 4 Mod. 206; *S. C.*, 1 Show. 441; Mr. Justice *Dolben* said, however, it had been always grumbled at; that it never came in question, but some judge or other was against it; that it having been so common in great livings, that the true patron in St. Andrew's, Holborn, had not presented above once in a hundred years, when he presented Dr. Stillingfleet; and he added, the church would suffer by it, because there was no one who had a great living but would present a blockhead, who was not likely to be made a bishop, in order to preserve his presentation: 1 Show. 461, 462, 463.

The king has this prerogative, although the advowson be newly created, and he has it *toties quoties*.

The king has this prerogative whether the church be new or old; and it extends as well to the second, third, and all other successive promotions to bishoprics from the same benefice or dignity: Gibson's Codex, 763, 2nd ed. Thus, by the 1 Jac. 2, it was enacted, that St. James in the Fields should be divided from the parish of St. Martin, and a church erected there, and that it should be a parish of itself; and it was determined in *The King* v. *Bishop of London and Birch*, 3 Lev. 382; 2 Salk. 540; 4 Mod. 200; 1 Show. 164, *S. C.*, on the promotion of the rector of the parish of St. James to a bishopric, that the king has the same prerogative in churches newly erected, as in the old, to present, on promoting the parson to a bishopric; and in the above case of *The King* v. *Bishop of London and Dr. Lancaster*, 3 Lev. 377, the crown presented thrice successively to the living of St. Martin in the Fields: and so, where the rector of Bow Church, &c., united into one parish by the 22 Car. 2, c. 11, s. 63, was created Bishop of Rochester, King George I., by his prerogative, in 1720, presented Dr. Lisle, who being afterwards created Bishop of St. Asaph, King George II., in 1744, presented Dr. Newton in like manner: *Grocer's Company* v. *Archbishop of Canterbury*, 3 Wils. 214; *S. C.*, 2 W. Black. 770.

XIV. Sale of Advowson.

bishopric [either] before [or after] the said ——— day of ———, this contract shall not be affected thereby, nor shall

bishop, contract not to be affected.

In Ireland, no person could formerly accept a bishopric there, until he had resigned all the preferments which he had in England: which preferments being void before the acceptance of the bishopric, it seems that the king in such case would lose the presentation: 1 Burn's Eccl. Law, 9th ed. 141, 212.

Quære, whether this doctrine extended to Ireland.

Colonial bishopric.

No right of the crown to present to a benefice arises upon the appointment of the incumbent to a colonial bishopric: *Reg.* v. *Eton College*, 8 Ell. & Bl. 610; *S. C.*, 27 L. J., Q. B. 132, and 4 Jur., N. S. 35.

The right of the crown postpones the right of any grantee who has the next avoidance; as in the case put in Co. Litt. 379 a, that if a man seized of an advowson in fee, whether in gross or appendant, take a wife, by act in law the wife is entitled to the third presentation, if the husband die before: F. N. B. 148, C.; 150, G.; Perk. s. 342, 343; Co. Litt. 32 a (*contra*, Cro. Jac. 691); and if the husband grant the third presentation to another, and the husband die before the church becomes void, the heir shall present twice, and the wife shall have the third presentation, and the grantee the fourth; for, in this case, it shall be taken to be the third presentation, which he might lawfully grant. Thus, in the *Grocer's Company* v. *Archbishop of Canterbury*, in which three patrons had a right to present by turns, it was decided by the whole Court, that the prerogative presentations cannot be considered as *turns*, or deprive a patron of his turn; for a prerogative presentation upon the promotion of an incumbent to a bishopric is by act of law, which cannot operate to the injury of a third person; for *constructio et actus legis nulli facit injuriam:* Co. Litt. 148, 183 a, b; 2 Inst. 287; Dyer, 35, b. In fact this is the fifth vacancy; but with respect to the patrons, it is but the third opening or avoidance, wherein the presentation of a patron, having the third turn, could take place: 3 Wils. 232; 2 W. Blacks. 773; *vide* Perk. s. 331, 332; Hal. MS. n.; Co. Litt. 32 b; stat. 3 & 4 Will. 4, c. 27, s. 31, *ante*, p. 18.

The right of the crown postpones, but does not defeat the right of the person having the next presentation.

A grant of the next presentation means that which the grantor is next entitled to.

So the grant of the next presentation to a benefice was decided to mean the next which the grantor would by law be entitled to make; and that, therefore, if the present incumbent be made a bishop, a covenant for title in the grant is not broken, and the grantee may present on the next vacancy: *Calland* v. *Troward*, 2 H. Blacks. 324; *Troward* v. *Cailland*, in error, 6 T. R. 439; aff. D. P., *Id.* 778; 8 Br. P. C. 71.

Next presentation cannot be granted after church is vacant.

The grant of the next presentation, or of an advowson, made after the church is actually vacant, is a void grant *quoad* the fallen vacancy: *Brookbie's case*, Cro. El. 174; *Baker* v. *Rogers*, *Id.* 788; and the possession of a clerk who has been wrongly presented is a vacancy: *Walker* v. *Hammersley*, Skinn. 90. But it is good as to the advowson itself: *Wolferstan* v. *Bishop of Lincoln*, 2 Wils. 174; 3 Burr. 1504; 1 Wm. Blacks. 490; 2 *Id.* 1054, and Serjt. Hill's MS. notes, Elsley's edit. And even if the contract be simoniacal, the conveyance of the advowson made in pursuance of such contract is void only as to the next presentation: *Greenwood* v. *Bishop of London*, 1 Marsh, 292; 5 Taunt.

the said purchaser be entitled to any deduction out of the said purchase-money. XIV. Sale of Advowson.

In witness, &c.

XV. *AGREEMENT for the Sale of the* Next Presentation *to a Parsonage* (*a*).

ARTICLES OF AGREEMENT made this ——— day of ———, 18—, Between [*vendor*], of &c. (hereinafter re- Parties.

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727. It is said in some of the books that there is a difficulty in enforcing the right to present in case of a conveyance of the advowson during the vacancy, for that neither the grantor nor the grantee can bring a *quare impedit*; *Leak* v. *Bishop of Coventry*, Cr. El. 811; but this is a mistake. See *Rennell* v. *Bishop of London*, 7 B. & Cr. 113.

Where a person having notice that the incumbent of a rectory was on his death-bed, and that it was uncertain whether he would live over the night, purchased the advowson; the incumbent died the next day; whereupon the purchaser presented his clerk who was not privy to the contract: and the Court was of opinion, that the presentation was not void, it not appearing to have been made upon a simoniacal contract: *Barrett* v. *Glubb*, 2 Wm. Blacks. 1052; *S. C.*, Bac. Abr. title "Simony," (A.); and this decision was confirmed by the House of Lords (reversing the decision of the Court of King's Bench) in *Fox* v. *Bishop of Chester*, 3 Bligh, N. R. 123; 1 Dow. & Cl. 416. Purchase of advowson, incumbent being *in extremis*, clerk not being privy, next presentation good.

(*a*) By the 13 Ann. c. 13, s. 1, Roman Catholics are disabled from presenting to any benefice; and every such presentation is declared void to all intents and purposes. By the stat. 11 Geo. 2, c. 17, s. 5, every grant made of any advowson, or right of presentation, collation, nomination, or donation to any benefice, by any person professing the Roman Catholic religion, or by any mortgagee, or trustee of such person, shall be null and void; unless it be for valuable consideration to a Protestant purchaser; 3 Cru. Dig. 26, 2nd ed., *ante*, p. 146; and the same statute also avoids the devise of any such benefice with the intent to secure the benefit thereof to the heirs of any Roman Catholic. The Act of 10 Geo. 4, c 16, has not removed the disabilities of Papists in respect of ecclesiastical and charitable patronage: ss. 16, 17, 18. The practice of many of the leading Roman Catholic families has been to leave the advowsons attached to their estates to descend from time to time, and expressly to exclude them from the operation of a settlement or a will, taking care that the next presentation after a subsisting incumbency is actually and *bonâ fide* sold in the market to a Protestant purchaser, when and so soon as a new incumbent has been appointed. Other Roman Catholic families appear to have ignored the statutes, and have adopted the practice of including a grant of advowsons in the settlements of their Roman Catholics cannot present to benefices; and grants by them must be to Protestant purchaser.

XV. Sale of Next Presentation to Parsonage.

ferred to as the vendor), of the one part, and [*purchaser*], of &c. (hereinafter referred to as the purchaser), of the other part.

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estates; but as they could not present on a vacancy, the tenant for life has conveyed the next presentation to some Protestant friend, or demised to him the advowson for ninty-nine years if the tenant for life should so long live, in trust to present such person as the Protestant shall think fit. When the living becomes vacant the Protestant presents the Papist's nominee, but it is considered that this latter practice is directly opposed to the statute, and that all such attempts to evade the restriction thereby imposed are utterly void. The right of presentation given by the stat. of 13 Ann. c. 13, to the universities, does not arise where a Papist is jointly seised of an advowson with a Protestant, but the whole right resides in the latter: *Edwards* v. *Bishop of Exeter*, 7 Scott, 652; 5 Bing. N. C. 652. A Jew may present to a living. See 7 Bligh, 322. An infant may nominate and present to a benefice; for his guardian takes nothing but that for which he can account, and a presentation after a vacancy has no pecuniary value: Co. Litt. 17 b; *Bishop of London* v. *Wolferstan*, 2 Wils. 174: *Arthington* v. *Coverley*, 2 Eq. Ca. Ab. 518; 1 Fonbl. Eq. 84, n. Under the old law an avoidance before a sale by the assignees of a bankrupt patron belongs to the bankrupt: Watson, 106; 7 Scott, 667. But by the Bankruptcy Act, 1883, sect. 44 (ii.), re-enacting Act of 1869, s. 15 (4), the right of nomination to a vacant ecclesiastical benefice remains in the bankrupt. An outlaw's right of presentation, as already mentioned, belongs to the crown, and so does that of an alien: Wats. 106.

Papist joint owner with Protestant.

As to the right of presentation among tenants in common, joint-tenants, and coparceners, see Co. Litt. 186, b; *Seymour* v. *Bennett*, 2 Atk. at p. 483; *Barker* v. *Lomas*, Wilks, 659; *Buller* v. *Bishop of Exeter*, 1 Ves. sen. 340; *Edwards* v. *Bishop of Exeter*, 7 Scott, 652; *Richards* v. *Earl of Macclesfield*, 7 Sim. 257.

Clergymen not to purchase the next presentation, and be presented thereupon.

The stat. 13 Ann. c. 11, s. 2 (Rev. Stat.), after reciting "Whereas some of the clergy have procured preferments for themselves by buying ecclesiastical livings, and others have been thereby discouraged," enacts, "That if any person, from and after the twenty-ninth day of September, 1714, shall or do, for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept, the next avoidance of, or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, *and shall be presented or collated thereupon*, that then every such presentation or collation, and every admission, institution, investiture, and induction upon the same, shall be utterly void, frustrate, and of no effect in law, and such agreement shall be deemed and taken to be a simoniacal contract; and that it shall and may be lawful to and for the Queen's

1. The vendor agrees to sell, and the purchaser agrees to purchase, for the sum of £———, the next presentation (*b*),

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Majesty, her heirs and successors, to present or collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only; and the person so corruptly taking, procuring, or accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth, be adjudged a disabled person in law to have and enjoy the same benefice, dignity, prebend, or living ecclesiastical, and shall also be subject to any punishment, pain or penalty, limited, prescribed, or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made after such benefice, dignity, prebend, or living ecclesiastical had become vacant; any law or statute to the contrary in any wise, notwithstanding."

Agreement to sell.

In the late Serjeant Hill's copy of Sir Wm. Blackstone's Reports, under *Barrett* v. *Glubb*, 1053, he says, from the title of the Act, the general opinion has been, as mentioned by *De Grey*, C. J., in this case, that the statute hath disabled every clergyman from purchasing the next presentation of any church preferment; but it is observable, that the purview of the Act does not extend to a purchase by a clergyman, unless he or some other for whom he purchased it, be presented or collated thereupon; and on the other hand, though the purchaser was a layman, yet if he afterwards took orders, and was presented or collated to the living, &c., the next presentation of which he had purchased, the case would be within the purview.

But it appears by the following opinion of the learned Mr. Fearne, that the purchase of an advowson in *fee* by a clergyman, and a presentation of himself upon the death of the incumbent, is not within the statute: "I cannot say I see any thing to impeach the legality of the purchase by A. B. of the perpetuity of the advowson, or his being presented on the next avoidance, by a trustee of his own, to whom he shall have conveyed the advowson previous to such avoidance. The 12th Ann. c. 12 (13th Ann. c. 11, Rev. Stat.), prohibits a clergyman's purchasing the next avoidance, or presentation to any benefice for himself; but I do not apprehend that statute at all affects the case of a purchase of the perpetuity of the advowson, or affects the right of presentation in that case; and, consequently, it appears to me, that if A. B., by deed, grants the advowson to, and to the use of some person and his heirs, who, by another deed of even date, declares the conveyance to be in trust for the said A. B. and his heirs, the said A. B. may afterwards, upon the happening of an avoidance, be legally presented by his said trustee:" Fearne's Posth. Works, 409. This view is consistent with the generally received opinion of the profession upon the subject, and, it is conceived, with the sound construction of the statute; for it seems to be impossible, without a manifest departure from the strictness of construction which is always given to a penal statute, to treat the words "next avoidance or presentation," as extending to an advowson.

But clergymen may purchase the advowson, and be presented on the next avoidance.

(*b*) Where a person purchased the next presentation to a

Purchase of next presen-

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of and to the rectory and parish church of ———, in the county of ———, and in the diocese of ———.

To deliver abstract.

2. The vendor will deliver to the purchaser within ——— days after the date hereof, an abstract of the title of the said vendor, to grant the next presentation of and to the said rectory and parish church [*continue, ut ante*, p. 463].

3, 4. [*Delivery of requisitions. Requisitions insisted on to entitle vendor to rescind, ante*, pp. 403, 404.]

To execute conveyance at purchaser's expense.

5. [*Completion of purchase, ante*, p. 463; *and continue.*] On payment as aforesaid of the said sum of £———, the vendor, and all other necessary parties, if any, shall execute a proper assurance of the next presentation to the said rectory and parish church unto the purchaser, or as he shall direct (*c*). The assurance shall be prepared by, &c. [*ut ante*, p. 405].

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tation, with intention to present a certain person, not simony, it seems.

benefice, the church being then full, with an intention to present a particular person, a subsequent presentation of that person was formerly deemed simony; but it is now a universal practice to purchase the next presentation to a living, the church being full; and there is no modern instance where presentation under such circumstances has been questioned: 3 Cru. Dig. 33, 2nd ed. See *Fox* v. *Bishop of Chester*, 3 Bligh, N. S. 123; 1 Dow. & Cl. 416; and see the notes on this case in 1 Tud. L. C. 190. See further, as to simony, *infra*, tit. Bond.

Next presentation when separated is a chattel.

(*c*) The right of presentation on the next avoidance is part of the advowson, and, while the church remains full, devolves with it on the heir; but if the right to present for the next turn is separated from the advowson, it is a chattel and goes to the executor: *Smithley* v. *Chomely*, Dyer, 135 a.; Wentw. Offi. Ex. pp. 130 n.; 131, 14th ed.; 13 Vin. Abr. 84, *Faits*, M. A., pl. 24; 7 Bligh, 256; see also Williams on Executors, 676. A next presentation is chargeable with legacy duty.

Nature of the right to present after a vacancy. It goes to the executor.

Immediately upon the happening of a vacancy, the right of nomination (in case of a *presentative* advowson) becomes a distinct right, in the nature of a chattel, separate from the advowson, in the same manner as rent due is distinct from the rent-charge in fee in respect of which it became due: *Alston* v. *Atlay*, 2 Nev. & P. 492. It is a *profit*, which becomes due the moment it is exercisable. In some cases this interest is called "a *chose en action*:" *Leach* v. *Babington*, Cr. El. 811; in some, a "chattel," as in *Fane and the Archb. of Canterbury's case*, 4 Leon. 109. In others, as Fitz. N. B. *Quare impedit*, 34, N.; and 3 Keble, 152, "a chattel vested;" a "personal chattel:" Vin. Abr. *Executor*, Z. 2, pl. 4, n.; "a chattel vested and severed from the manor" (in case of an advowson appendant), Fitzh. N. B. 33, P. In one it is called "a personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy;" also, "a thing in right, power, and authority;" and also "a *chose en action*, and, in effect, the *fruit* and *execution* of the advowson, and not any advowson,"

6. The vendor shall, at his own charges, on the execution of the said conveyance, deliver to the purchaser true and attested copies of the several title deeds, &c. [*ut ante*, p. 463].

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To deliver attested copies; and covenant to produce deed.

by six justices, in *Stephens* v. *Wall*, Dyer, 283 a. In 3 Leon. 256, "a power to present, and an authority annexed to the person." In *Digby* v. *Fitch*, Brownl. & Goldesb. 167, Justice *Warburton* said—"The presentment is the possession in a *Quare impedit*, as in rent the receiving, and in common, the taking of the profits." In *Brooksby* v. *Wickham*, 1 Leon. 167, it is also compared to rent, and this analogy will be found to be the most perfect. The advowson is the estate which descends, and may be conveyed, limited, and escheats as such. The presentation is the mode of enjoyment, the profit or rent of the estate, and, like the rent or profit, belongs to the owner of the estate, at the time it accrues, in the nature of a personal chattel, distinct and severed from the inheritance; it belongs to him not as owner, but as an individual: Per *Parke*, J., *Mirehouse* v. *Rennell*, 7 Bligh, at p. 277. Thus in an old case, it is laid down, that if an advowson comes to the Queen for forfeiture by outlawry, and then the church becomes void, and the Queen presents, and then the outlawry is reversed for error, yet the Queen shall enjoy the presentment, because it came to the Queen as a profit of the advowson; but if the church be void at the time of the outlawry, and the presentment be forfeited as a chattel principal and distinct, and then the outlawry is reversed, the party shall have restitution of the presentment: *Beverley and Cornwall's case*, Moore, 269. So a lessee of an advowson may present, after his term has expired, to a vacancy which occurred during the term. See Fitzh. N. B. *Quare impedit*, 33, A.; 2 Roll. Ab. 345; 7 Bligh, 261. And where a married woman is entitled to an advowson, and dies during a vacancy, the presentation is in her husband, although he be not entitled by the curtesy. See Co. Litt. 29 a, 120 a, 388 a. So, if a vicarage happen void, and before the parson present, he is made a bishop, &c., yet he shall present to the vicarage, for it was a chattel vested in him: Fitzh. N. B. 34, N.

Forfeiture of advowson.

Right of presentation.

Therefore, if a person seised in fee or in tail of a presentative advowson, appendant or in gross, die after an avoidance, and without having presented a successor, the right of presentation vests in the executor and not in the heir: Br. Ab. *Presentacion*, 34; Fitzh. N. B. 33; Co. Litt. 388 a; Dy. 283 a; Com Dig. *Esglise* (H. 2); *The Queen, Fane, and Archbishop of Canterbury's case*, 4 Leon. 109; *Repington* v. *Governor of Tamworth School*, 2 Wils. 150. But where the patron in fee is himself the incumbent and dies, as the titles of the heir and executor accrue at the same moment, the "elder" title of the heir is preferred: *Holt* v. *Bishop of Winchester*, 3 Lev. 47; 7 B. & Cr. 147.

Death of patron during vacancy.

Where patron is incumbent.

As the heir of a donative patron is not affected by the law of lapse, nor compellable at common law to appoint to a vacancy, and may take the profits during the vacancy (*ante*, p. 459), a right of appointing the successor in the executor would be clearly adverse to his interest, and this appears to be the foundation of the rule, that if the patron of a donative advowson in fee die during a vacancy, the heir, and not the executor, shall present:

In the case of a *donative*, a void turn goes to the heir.

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7. If the present or any succeeding incumbent of the said rectory should at any time hereafter during his incumbency

If present or succeeding incumbent be

Repington v. *Governor of Tamworth School*, 2 Wils. 150; 7 B. & Cr. 151.

Right of presentation where ecclesiastical patron dies during a vacancy.

The right of presenting, when vested, being a chattel, and it being an established rule that a corporation sole cannot take a chattel by succession (*Fulwood's case*, 4 Rep. 64 a, except by custom, as by the custom of London a bond to the chamberlain for orphanage money will pass to the successor, *Byrd* v. *Wilford*, Cr. El. 464, or in the case of the crown), it follows that, where an advowson presentative is vested in an ecclesiastical person, and he dies during a vacancy, his executor, or, in the case of a bishop, the crown, and not his successor, shall present. Thus where a prebendary, who had the advowson of a rectory in right of his prebend, died during the vacancy of the church, his personal representative was held entitled for that term: *Rennell* v. *Bishop of Lincoln*, 7 B. & Cr. 113, reversing judgment in C. P. 11 J. B. Moore, 139; affirmed in the House of Lords, *Mirehouse* v. *Rennell*, 1 M. & Sc. 683; 7 Bligh, 241.

Presentation of an advowson collative on death of bishop.

But when a bishop dies, a church being vacant in his life, the crown, and not the bishop's executor or administrator, shall present, taking the void turn as part of the temporalities; and where a tenant by knight service, *in capite*, with an advowson appendant, which had become void in his life, died, his heir within age, the King presented, and not the executor or administrator, who would have been entitled if the land had been holden of a subject: Co. Litt. 388 a. But these exceptions are referable to the prerogative, and do not show that the void turn remains parcel of the advowson; for though the Queen omits to present in the one case till she restore to the bishop his temporalities, or in the other till the heir, being of age, obtain his livery, still the presentation for that term remains in the crown: Fitzh. N. B. 33 (N. O); 7 Bligh, 280.

Another exception, founded on the prerogative, or rather, perhaps, in analogy with the rule as to donatives, is, that when the Queen dies, leaving a church void, her successor shall present, as she is entitled to the temporalities where the predecessor died *sede vacante*. See 7 Bligh, 308.

Appointment in right of office.

These cases of advowsons must be distinguished from other rights of appointment which are annexed to an office, for if a person holding an office, in right of which he presents to another office, dies during a vacancy, his successor and not his executor shall appoint to the office, as in the case of *exigenter: Scroggs* v. *Coleshill*, Dyer, 175. The reason is, that it is a personal thing annexed to the judge of the Court who is to appoint the officers of the Court; and if the office becomes vacant, and the judge dies, his executor can have nothing to do with the appointment, for it belongs to the judge to appoint the officers of the Court. The office of a judge is not like an advowson, which is a thing that descends, and is capable of being conveyed from one person to another, and the presentation of which is the fruit of the

XV. Sale of Next Presentation to Parsonage.

of the said rectory be created a bishop, whereby the right of presentation to the same rectory may devolve to the crown, then the said [*purchaser*] shall have the first or next turn or right of presentation to the said rectory, after the crown (*d*).

made a bishop, purchaser to have the next presentation.

In witness, &c. (*e*).

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advowson: Per *Littledale*, J., 7 B. & Cr. 165. If the office were an office of profit and saleable, it would perhaps be otherwise.

Mortgagee and trustee must present nominee of mortgagor, &c.

The mortgagee of an advowson, whether appendant or in gross, has the legal right to present; but, until foreclosure, a Court of Equity will compel him to present the nominee of the mortgagor: because the mortgagee can make no profit by presenting to the church, nor can he account for any value in respect of it to sink or lessen his debt: *Mackenzie* v. *Robinson*, 3 Atk. 559; *Jory* v. *Cox*, Pr. Ch. 71; *Hungerford* v. *Clay*, 9 Mod. 1; *Amherst* v. *Dowling*, 2 Vern. 401. So a trustee must present the clerk of the *cestui que trust:* 2 Atk. 483; 2 W. Blacks. Rep. 1053. It is obvious therefore that an advowson can only be made available as a security to a mortgagee, or an annuitant, by means of a power of sale.

As to providing for promotion of incumbent.

(*d*) This being the rule of law on the subject, *ante*, p. 466, n., it is mentioned on an honourable principle, that the purchaser may be aware of it, and provide accordingly. When it is probable the incumbent will be promoted to a bishopric, and sometimes when it is not probable, it is usual to insert a provision, should that event happen, to make a proportionable deduction from the purchase-money, to be ascertained by two arbitrators, or their umpire; or to re-pay the purchase-money, with interest at five per cent.

Stamp.

(*e*) Although under an agreement for a next presentation, equity would compel the vendor to present the purchaser's nominee, the agreement does not require an *ad valorem* stamp: *Wilmot* v. *Wilkinson*, 9 Dowl. & R. 620; 6 B. & Cr. 506.

XVI. *CONTRACT for* SALE, *by a* TENANT IN TAIL, IN REMAINDER, *of the* NEXT PRESENTATION *to a* RECTORY *in the event of the Tenant in Tail being entitled in possession on its falling vacant; with* COVENANT *to* REFUND *the* PURCHASE-MONEY, *in the event of the Tenant in Tail not so becoming entitled*, &c.

ARTICLES OF AGREEMENT made the ——— day of ———, 18—, BETWEEN [*tenant in tail*], of the one part, and [*purchaser*], of the other part. WHEREAS the said [*tenant in tail*] is entitled in tail male general to the advowson or right of patronage and presentation of and to the rectory and parish church of ———, in the county of ———, and in the diocese of ———, with the appurtenances, in remainder, expectant on the decease of [*tenant for life*]; AND WHEREAS the Rev. [*incumbent*] is the present incumbent of the said rectory and parish church of ———, and is now of the age of ——— years or thereabouts. NOW THESE PRESENTS WITNESS, that in consideration of the sum of £——— by the said [*purchaser*] to the said [*tenant in tail*], paid at or before the execution of these presents, the receipt of which sum of £——— he, the said [*tenant in tail*], doth hereby acknowledge, HE, the said [*tenant in tail*], hereby covenants and agrees with the said [*purchaser*], in manner following, that is to say :—

Parties.

Recital of title to advowson as tenant in tail in remainder.

Age of incumbent.

Agreement to sell next presentation in case it falls vacant while vendor's estate is in possession.

1. In the event of the death of the said [*tenant for life*], in the lifetime of the said [*tenant in tail*], and also by death, resignation, cession, deprivation, avoidance, or otherwise of the said rectory and parish church of ———, in the lifetime of him the said [*tenant in tail*], and after the decease of the said [*tenant for life*], he the said [*tenant in tail*] will sell and assure unto, and at the expense of the said [*purchaser*], the now first and next presentation to the said rectory and parish church of ———, with the appurtenances, for all the now first and next vacation or avoidance of the same.

Purchaser may present one of his sons or a stranger, in trust to resign in favour of one of purchaser's sons,

2. It shall be lawful for the said [*purchaser*] his executors, administrators, or assigns, in the event of the decease of the said [*tenant for life*], in the lifetime of the said [*tenant in tail*], and also of such avoidance as aforesaid of the said rectory in the lifetime of the said [*tenant in tail*], and after the decease of the said [*tenant for life*], by virtue of these

XVI. Sale of Next Presentation by Tenant in Tail in Remainder.

presents, and of the conveyance to be made pursuant thereto, to present to the said rectory, and to the diocesan of the same, or any person competent in that behalf, when the church shall, by death, resignation, privation, cession, or other means first and next after the date of these presents, happen to be void, any son of him, the said [*purchaser*], who, in the happening of the events, may then be in holy orders, and capable of taking and holding the same; and if the said [*purchaser*] shall not then have any such son, who shall so then be in holy orders, and capable of taking and holding as aforesaid, then some other fit and proper person, who shall then be in holy orders, and so capable of taking and holding as aforesaid, on a bond of resignation by such person to vacate the living of the said rectory and parish church in favour of one of two sons of him the said [*purchaser*], in such bond to be specially named and described, who shall thereafter take holy orders, and be capable of holding the same living.

when he shall become competent.

3. The said [*tenant in tail*] will, at his own expense, make and deliver unto the said [*purchaser*], or his solicitor, an abstract of the title of him the said [*tenant in tail*] to the said advowson, right of patronage, and presentation of and to the said rectory. In case the decease of the said [*tenant for life*] shall not happen in the lifetime of the said [*tenant in tail*], or in case no such avoidance as aforesaid of the said rectory shall happen in the lifetime of the said [*tenant in tail*], or if such avoidance shall happen in the lifetime of the said [*tenant for life*], or if the said [*tenant for life*] in exercise of his statutory powers in that behalf shall sell the advowson or the next presentation to the said rectory, then and in either of such cases he the said [*tenant in tail*], his heirs, executors, or administrators, shall, within the space of six months next after the decease of the said [*tenant for life*], refund and pay unto the said [*purchaser*], his executors, administrators, and assigns, his said consideration money, or sum of £———, together with interest for the same from the day of the date of these presents, at the rate of £——— per centum per annum, without deduction.

Vendor to deliver abstract;

to refund purchase-money if the next avoidance does not fall in his time.

In witness, &c.

XVII. *AGREEMENT for the* Sale *of an Estate for the* Life *of the Vendor; or for the Life of another Person or Persons* (*a*).

Parties.

AN AGREEMENT made the ——— day of ———, 18—, Between [*vendor*], of &c. (hereinafter called the vendor), of the one part; and [*purchaser*], of &c. (hereinafter called the purchaser), of the other part.

1. The said vendor agrees to sell, and the purchaser agrees

A *quasi* entail of an estate *pour autre vie* may be conveyed by an ordinary conveyance.

(*a*) The having issue is not an essential preliminary to the power of alienation in the case of an estate *pour autre vie*, limited to one and the heirs of his body, as it is in the case of a conditional fee at common law, Hargr. n. Co. Litt. 19 a.; from which the mode of barring by alienation was evidently borrowed: Hargr. n. Co. Litt. 20 a (5); 2 Gwill. Bac. Abr. 543. Estates *pour autre vie*, not being entailable within the statute *de donis conditionalibus*, 13 Ed. 1, c. 1, such persons as have interests in them in the nature of estates tail, may bar their issue and all remainders over, by *alienation* of the estate *pour autre vie*, in the same manner as those who are strictly speaking tenants in tail may do by an enrolled assurance; such as a conveyance by the *quasi* tenant in tail, or surrender to the immediate remainderman or reversioner, although it be only to renew the lease, and although the surrender be made without the concurrence of the trustees of the legal estate, or even by an agreement, either to sell or settle the estate: *Low* v. *Burrow*, 3 P. Wms. 262; 2 Eq. Ca. Abr. 394, pl. 1; *Baker* v. *Bayley*, 2 Vern. 225; *Norton* v. *Frecker*, 1 Atk. 524; *Wasteneys* v. *Chappel*, 3 Bro. P. C. 50; *Forster* v. *Forster*, 2 Atk. 259; *Blake* v. *Blake*, 1 Cox, 266; *Blake* v. *Luxton*, G. Coop. 178. But not by devise: *Saltern* v. *Saltern*, 2 Atk. 376; *Campbell* v. *Sandys*, 1 Sch. & Lef. 281. In *Dillon* v. *Dillon*, 1 Ball & B. 95, the settlement was of lives renewable for ever, and the *quasi* tenant in tail, on whose will the question arose, had died without issue, so that his estate was spent, and *on that ground* Lord *Manners* held that he could not bar the remainderman by his will. The Statute of Wills, 7 Will. 4 & 1 Vict. c. 26, s. 3, extends the devising power over all real and personal estate which the testator shall be entitled to at the time of his death, and which would otherwise devolve upon his *heir at law or customary heir*, or upon his executor or administrator; and the clause further declares that the power thereby given shall extend to estates *pour autre vie*, whether there shall or shall not be any special occupant thereof. The clause in the Statute of Frauds, by which the question was formerly governed, does not mention special occupancy generally, but alludes to "the heir," and to "executors and administrators," as special occupants. But the language of the Courts has always treated the issue *quasi* in tail and the remaindermen as special occupants; see *Saltern* v. *Saltern*, 2 Atk. 376; and the question upon the statute, whether the earlier part of the clause just cited controls the general meaning of the subsequent words relating to

Disposing power of a *quasi* tenant in tail.

Stat. 7 Will. 4 & 1 Vict. c. 26, s. 3.

XVII. Sale of Estate for Life or pour autre vie.

to purchase, ALL that the estate for life, without impeachment of waste, of the vendor (*b*), of and in that messuage or tenement and hereditaments with the appurtenances, situate, &c. [*describe parcels*], for the sum of £———.

To make and deliver abstract.

2. The vendor, shall at his own cost, make and deliver unto the purchaser, or his solicitor, an abstract of the title to the premises (*c*).

If title good, to make conveyance.

3. If it shall appear to the satisfaction of the purchaser's solicitor that the vendor has a good title to an estate for his life in the said premises, then the vendor and all other necessary parties shall, on or before the ——— day of ——— now next, convey and assure unto the purchaser, or as he shall direct, the said messuage and premises, for the (*d*) life of the vendor, free from all incumbrances (*e*); *And*, at the same time, deliver unto the purchaser all the title deeds and writings in the possession or power of the vendor, relating to the said premises.

And deliver title deeds.

Preparation of conveyance.

4. The said conveyance shall be prepared by and at the expense of the purchaser [*continue, ut ante*, p. 405].

Wife's estate *pour autre vie.*

estates *pour autre vie* has never yet been decided. When a married woman has a freehold in an estate *pour autre vie*, either absolutely, or *quasi* in tail, (not held by statute or otherwise to her separate use, *ante*, p. 215,) a conveyance by herself and her husband, acknowledged by her, is necessary: *Duke of Grafton* v. *Hanmer*, 3 P. Wms. 266, note; Perk. s. 613; Harg. n. Co. Litt. 121 a; 2 Bl. Com. 355; 5 Cru. Dig. 200; Wms. n. 2, Saund. 175 f. (3); Gilb. Uses, 40, 244.

ESTATE FOR OTHER LIVES.

(*b*) If the estate be held for the lives of other persons, say,

Reference to freehold lease.

"the estate of him the vendor, for the lives of [*nominees*], granted and demised by an indenture, bearing date the ——— day of ———, 18—, and expressed to be made between [*lessor*], of &c., of the one part, and the vendor (or [*lessee*], of &c.), of the other part; of and in ALL THAT, &c."

(*c*) Here insert any stipulations as to commencement of title, delivery of requisitions, &c. as may be required, *vide ante*, Precedents I., II., &c.

ESTATE POUR AUTRE VIE.

(*d*) "for the lives of the said [*nominees*], and the [*survivors and*] survivor of them."

LEASEHOLD.

(*e*) If held by lease, say,

Subject to rent and covenants.

"*But* subject to the rent, covenants, conditions, and agreements, reserved and contained in the said indenture of lease."

XVII. Sale of Estate for Life or pour autre vie.

5. All (*g*) rates, taxes, and outgoings, payable for or in respect of the said premises, to the ——— day of ———, shall be paid by the vendor, from which time the purchaser shall be let into possession of the said premises, and for this purpose time shall be of the essence of the contract.

Delivery of possession.

Death of vendor not to affect agreement.

6. The death of the said (*h*) [*vendor*], before the said ——— day of ——— next, shall not in anywise affect this agreement.

In witness, &c.

XVIII. *AGREEMENT for the* Sale *of a* Remainder *or* Reversion *in Fee expectant on an Estate for Life.*

AN AGREEMENT made the ——— day of ———, 18—; Between [*vendor*], of &c. (hereinafter called the vendor), of the one part; and [*purchaser*] (hereinafter called the purchaser), of &c., of the other part.

Parties.

Vendor agrees to sell.

1. The vendor hereby agrees to sell, and the purchaser agrees to purchase, the remainder or reversion in fee of him the vendor, expectant upon the determination of the estate for life, without impeachment of waste, of [*tenant for life*], of &c., of and in All those messuages, &c. [*describe parcels*], with their appurtenances, free from all incumbrances (*i*), at or for the price or sum of £———.

Parcels.

To deliver abstract.

2. The vendor shall within, &c. [&c. *ut ante*, p. 403].

Requisitions, &c.

3. [*Delivery of requisitions, &c., ut ante*, p. 403.]

4. [*Vendor may rescind if requisitions pressed, ante*, p. 404.]

5. [*As to errors of description*, see pp. 404, 409.]

All necessary parties to execute conveyance.

6. The vendor and all other necessary parties (if any), shall, on or before the said ——— day of ———, on receiving from the purchaser the said sum of £———, execute a proper conveyance of the said remainder or re-

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Leasehold for lives.

Estate for other lives.

(*g*) If held by lease say "rent."

(*h*) "[*nominees*], or any or either of them, before, &c."

(*i*) If the tenant for life is the purchaser add,

"to the intent that the same may merge and be extinguished in the inheritance, and that the purchaser may immediately on the completion of the purchase become seised of the premises for an estate in fee simple in possession."

version unto the purchaser, or otherwise as he shall direct, free from incumbrances. Such conveyance shall contain a covenant by the purchaser to pay and discharge all succession duty which shall become payable upon the death of the said [*tenant for life*], and to keep the vendor indemnified therefrom (*k*). XVIII. For Sale of Reversion. Purchaser agrees to pay succession duty.

7. The said conveyance shall be prepared by and at the expense of the purchaser; *And* shall be left for approval on the part of the said vendors' solicitors ——— days at least before the time fixed for completion of the purchase. Conveyance to be at purchaser's expense;

8. The deeds and documents of title, relating to the said messuages and premises, are in the possession of the said [*tenant for life*], as such tenant for life as aforesaid. The said conveyance shall contain the following covenants by the vendor, that is to say,—that so soon as by the death of the said [*tenant for life*], or otherwise, the said deeds and documents shall come into the possession of the vendor, he the vendor will forthwith deliver to the purchaser all such of the said deeds and documents as relate exclusively to the same messuages and premises; and also that he the said vendor will upon the request in writing of the purchaser, his heirs and assigns, but at the cost of the person or persons making such request, produce to the purchaser, his heirs and assigns, such of them as shall relate not only to the said messuages and premises hereinbefore mentioned, but also to other property of him the vendor, and which it is agreed shall accordingly be retained by him, and will make and furnish to the purchaser, his heirs and assigns, or allow him and them to make and take, copies, abstracts, and extracts thereof and therefrom; and in the meantime keep the said deeds and documents safe, whole, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident (*m*). custody of deeds (*l*).

9. If the said conveyance and assurance should not be executed before the said ——— day of ———, then this Time, the essence of the contract.

(*k*) In the absence of stipulation to the contrary, the purchaser must pay the succession duty: *Cooper* v. *Trewby*, 28 Beav. 194.

(*l*) If the tenant for life is the purchaser, this clause will be omitted.

(*m*) A statutory acknowledgment and undertaking is not applicable to the above circumstances, *vide ante*, p. 253, tit. ACKNOWLEDGMENTS.

XVIII. For Sale of Reversion.

agreement shall be wholly void to all intents and purposes whatsoever, and for this purpose time shall be of the essence of the contract (*n*).

10. The death of the said [*tenant for life*] shall not in anywise affect this agreement.

As WITNESS, &c.

XIX. *AGREEMENT for the Purchase of* GROWING TIMBER.

AN AGREEMENT made the ——— day of ———, 18—; BETWEEN [*vendor*] (*o*), of &c., of the one part; and [*purchaser*], of &c., of the other part; WHEREBY IT IS AGREED, as follows, that is to say:—

Parties.

Agreement for the sale of the timber.

1. The said [*vendor*] shall sell, and the said [*purchaser*]

Time, the essence of the contract in sales of reversionary interests.

(*n*) A similar provision to the above should never be omitted, unless the agreement of the parties be otherwise; although, in the absence of any express stipulation, if on an agreement for the sale of a reversionary estate, part of the terms is, that the purchase-money shall be paid by a certain time, and it be not so paid, by default of the purchaser, the vendor is discharged from his contract; because it is of the essence of justice that such a contract should be executed immediately, and without any delay; as no man sells a reversion who is not distressed for money; and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money during the delay: *Newman* v. *Rogers*, 4 Bro. C. C. 393; 1 Price, 298. See *Hipwell* v *Knight*, 1 Y. & C. Ex. 416. As to specific performance of contracts for the purchase of a reversion, see *Spurrier* v. *Hancock*, 4 Ves. 667; *Britton* v. *Twining*, 1 Madd. Ch. 417.

Sale of timber, &c. by tenant in tail.

(*o*) As a tenant in tail was, until recently, restrained from aliening the estate without an enrolled conveyance, now substituted for a fine or recovery, so he was restrained from charging it, or disposing, by contract or agreement, of the lasting improvements after his death. Therefore, if tenant in tail agreed for sale of the trees growing on the inheritance, the vendee must have severed them during the life of tenant in tail; for if he died before they are cut down, his issue should have them as part of the inheritance, and the vendee should not be permitted, after the death of tenant in tail, to fell one tree, though it be half cut down; for, as the tenant in tail had power over the inheritance only during his own life, he could not delegate that power to another for a longer time: and consequently, whatever remained part of the inheritance at the death of tenant in tail, when his power over it ceased, must necessarily have gone to the heir to whom the inheritance belonged: Bro. Abr. *Contract*, &c. 26; *Liford's case*, 11 Co. 50 a; Poph. 194; Hob. 173; 1 Pow. Contr. 127; 3 Bac. Abr. 64, n; Com. Dig. *Biens* (H).

XIX. Purchase of Growing Timber.

shall purchase ——— hundred oak trees, and ——— hundred ash and elms, all marked with the letter S, standing in and upon the demesne lands of ———, and in and upon several lands and grounds called ———; all which premises are now in the possession of ———.

Power to cut and carry away (*p*).

2. The purchase-money shall be paid by the said [*purchaser*], as follows (that is to say), £———, part thereof, upon the execution of these presents, and £———, the remainder thereof, on or before the ——— day of ——— next.

3. The said [*purchaser*] shall have full liberty for himself and his servants, agents and workmen to enter upon the said demesne and other lands, and cut down the said trees, at all reasonable and convenient times, and to lay and place the bark of the oak trees in convenient parts of the premises to dry: And the said trees and wood, with the bark of the oaks, and the boughs, lops, and tops, of the whole of the said trees, to draw, remove, carry off, and take away in lots in and by the most usual and convenient ways and parcels,

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Settled Land Act, 1882, sect. 35.

Cutting and sale of timber, and parts of proceeds to be set aside.

Now, however, by the stat. 45 & 46 Vict. c. 38, s. 35, it is enacted that:—

"(1) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, *on obtaining the consent of the trustees of the settlement, or an order of the Court*, may cut and sell that timber or any part thereof.

"(2) Three-fourth parts of the net proceeds of the sale shall be set aside and be capital money under this Act, and the other fourth part shall go as rents and profits."

Where the tenant for life (which term includes tenants in tail, and other limited owners, sect. 58), is an infant this power may be exercised by the "trustees of the settlement," or other persons appointed by the Court for that purpose. See as to the exercise of the powers of the Act by or on behalf of infants, married women, and lunatics, *ante*, pp. 412 n., 413 n.

Tenants for life may also, *for the purpose of the execution, or repair of "improvements"* (as to which see sect. 25 of the Act), "cut down and use timber and other trees not planted or left standing for shelter or ornament," without the necessity of obtaining any consent or order of Court (sect. 29). See further, as to the cutting of timber by limited owners, and generally as to waste, tit. Settlements.

As to succession duty on timber, see tit. Purchases.

(*p*) Although, on a grant or sale of trees, a right to cut them down and carry them away is implied by law, Noy's Maxims, 55, 9th ed; Plow. Com. 16; 11 Co. 52 a; yet it is prudent to insert this provision, as it gives greater powers than the law would imply.

XIX. Purchase of Growing Timber.

at any time on or before the twenty-ninth day of September next: And also for himself and his servants, agents, and workmen, and other person and persons to whom they shall sell and retail the said timber and wood, or any part thereof, to dig saw-pits and break up and saw the said timber in proper and convenient parts of the said premises in and upon which the said timber and wood stand and grow, at any time before the said twenty-ninth day of September next, without paying or making any satisfaction to the said [*vendor*], his heirs, assigns, or under-tenants.

Power to dig pits, to saw timber on premises.

Timber, &c. not removed by times agreed on to be forfeited.

4. All the said oak, ash, and other trees, with the boughs, lops, tops, and bark thereof, as shall not have been removed within the time before limited and agreed on for that purpose shall thenceforth be forfeited to the said [*vendor*].

Purchaser to fill up saw pits,

5. The said [*purchaser*] shall, within one month next after the said twenty-ninth day of September next, at his own costs and charges, fill up all such saw-pits as shall for the purposes aforesaid have been made by him or his servants, on any of the said lands: And also fence, amend, and repair all the hedges and fences in and about the said lands, in all such places as shall be broken, or otherwise damaged or destroyed, in felling, hewing, or carrying away the said timber, on being allowed by the said [*vendor*] hedge-wood for that purpose.

and repair hedges.

Disputes to be referred to arbitration, or umpirage.

6. If any dispute should arise between the said parties touching any clause, matter or thing relating to the sale of the said timber, the same shall be referred to and finally settled by two indifferent persons, one of whom to be chosen by each of the said parties; and if such two persons should not agree, then by an umpire to be chosen by them (*q*).

In witness, &c.

(*q*) If the vendor be tenant in tail (unless the case falls within the provisions of the Settled Land Act, 1882, stated in the last page), add the following clause:—

If vendor die before removal purchaser to have allowance.

"If the said [*vendor*] should die before the said twenty-ninth day of September next, and the said [*purchaser*] should be prevented from felling, sawing, or carrying away the said timber, as aforesaid, then the executors or administrators of the said [*vendor*] shall pay or allow unto the said [*purchaser*], such sum of money, by way of damages, as he shall thereby sustain; the same to be ascertained by arbitration, or arbitration and umpirage, as aforesaid."

For other stipulations as to sale of timber, see tit. Conditions of Sale.

XX. *AGREEMENT between two Vendors and a Purchaser, where* MONEY *to be paid on a Valuation of Timber is to be* INVESTED *in the Funds in the Names of Trustees, until a* TITLE *can be made to a* PART *of the* ESTATE *sold, and Title Deeds found; and in the meantime, as an* INDEMNITY *to the* PURCHASER.

ARTICLES OF AGREEMENT, made the ——— day of ———, 18—, BETWEEN [*one of the vendors*], of &c., widow, and sole executrix appointed by the last will of [*testator*], late of the same place ———, deceased, and [*the other vendor*], of &c., and which [*vendors*] are the devisees in trust, named in the same will, of the one part; and [*purchaser*], of &c., of the other part. Parties.

WHEREAS by an indenture of mortgage, dated the ——— day of ———, 18—, and expressed to be made between the said [*testator*], of the one part; and [*mortgagees*], of &c., of the other part; the said [*testator*], in consideration of the sum of £———, paid to him by the said [*mortgagees*], out of moneys belonging to them on a joint account, granted unto and to the use of the said [*mortgagees*], their heirs and assigns, a certain manor and hereditaments, situate, &c., subject to a proviso for redemption on payment by the said [*testator*], his heirs, executors, or administrators, unto the said [*mortgagees*], or the survivor of them, or the executors or administrators, or such survivors, or their or his assigns, of the sum of £———, and interest thereon, at the rate of five pounds per centum per annum, on the ——— day of ———, 18—; which indenture contains a declaration by the said [*mortgagees*] that the said mortgage money was produced by the sale of £——— Consolidated £3 per cent. Annuities, transferred to them by virtue of an indenture, dated the ——— day of ———, 18—, being a settlement made previous to the marriage of the said [*testator*] deceased, with [*wife*] his former wife, and that the said mortgage money was subject to the several trusts in the same indenture of settlement contained respecting the said sum of £——— Consolidated £3 per cent. Annuities: AND WHEREAS, the said [*testator*] died on the ——— day of ———, 18—, and ——— his former wife died on the ——— day of ———, 18—. AND WHEREAS the said [*deceased mortgagee*]

Recital of mortgage in fee by husband to the trustees of his marriage settlement, on their transferring to him the trust funds.

Recital of declaration, that mortgage money was trust money, and settled on the marriage of mortgagor with his late wife.

Recital of transfer of mortgage from trustee to two daughters,

XX. On a Purchase with a Defective Title.

died on the ——— day of ——— 18—. And whereas by an indenture endorsed on the said indenture of mortgage, and expressed to be made between the said [*surviving mortgagees*] of the one part, and [*daughters of testator*] of the other part, reciting that the said [*daughters*] as the only children of the said testator by his former wife A. B. were entitled in equal shares to the said sum of £———, secured by the said mortgage, the said [*mortgagee*], at the request of the said [*daughters*], transferred and assigned to them the said mortgage debt or sum of £———, and conveyed the mortgaged premises unto them and to their use in fee simple as tenants in common, subject to such equity of redemption as was contained in the said indenture of mortgage. And whereas the said [*vendors*], as such devisees in trust as aforesaid, lately agreed with [*purchaser*], of &c., for the sale to him of the fee-simple and inheritance of all that the then lately newly-erected capital messuage or dwelling-house, with the garden and outhouses thereto belonging; and also all that the manor and demesne and other lands, tenements, and hereditaments, to the said messuage, belonging, or in anywise appertaining; together also with the portion of two-thirds of tithes in and upon certain parts of the said demesne lands, containing about ——— acres; Which tithes were described to be then lately purchased by the said [*testator*], deceased, of A. B.; And which messuage, manor, hereditaments, and premises, were, by a printed particular, annexed to, and referred to by the contract now in recital, described to be situated in the county of ———, with the appurtenances, free from incumbrances (except a yearly rent of ——— shillings, payable by way of fee-farm rent), at the price of £———: And it was thereby further agreed, that the said [*purchaser*] should further pay to the said [*vendors*], for all the timber, including the bark, and tops and lops, growing upon the whole of the estate and premises, as the same should be valued by two indifferent persons or their umpire, one of such indifferent persons to be chosen by the said [*vendors*], and the other by the said [*purchaser*]; in which valuation all timber trees and saplings growing on the said premises, which were of the value of one shilling, or above that value, were to be estimated. And whereas the said manor, newly-erected capital messuage, and other messuages, lands, hereditaments, and premises, contracted to be

the only children of the marriage.

Recital of contract for purchase.

Parcels.

Recital of agreement that timber should be valued.

Recital, that the premises contracted to be purchased

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sold as aforesaid, comprised all the said manor, hereditaments, and premises, so mortgaged by the said [*testator*] as aforesaid, Except such part of the lands belonging to the same as had been conveyed or agreed to be conveyed by the said [*testator*], deceased, in his lifetime, and after making the above-recited mortgage as aforesaid to the said A. B., in exchange for the said portions of tithes included in the above-recited contract for sale; and also for all those several pieces or parcels of arable land, situate, lying, and being dispersedly in the common fields of ———, and within the manor of ——— aforesaid, containing by estimation ——— acres, ——— roods, and ——— perches (more or less), then or then lately in the possession of ———, under or by virtue of a copyhold or customary grant thereof, for lives, which same ——— acres, ——— roods, and ——— perches, were likewise included in such contract for sale. And whereas upon investigating the title to the said two-third parts of tithes, and the said ——— acres, ——— roods, and ——— perches of commonable land, it appears that the same is defective or cannot at present be made good; And therefore it has been agreed between the parties hereto, that a conveyance shall now be taken of the said manor, or reputed manor, newly-erected capital messuage, and other messuages, lands, hereditaments, and premises, comprised in the said indenture of mortgage, and being the whole of the premises thereby mortgaged (except as aforesaid), unto and to the use of the said [*purchaser*], his heirs and assigns: But that no conveyance shall now be taken of the said portion of tithes and commonable land so had in exchange as aforesaid, on account of the title thereto not being at present made good as aforesaid; But it has been agreed that the said [*purchaser*] shall immediately enter into and be entitled to the rents, issues, and profits, and become possessed of the same respectively. And whereas it has been agreed by and between the said [*vendors*], and the said [*purchaser*], that the sum of £———, mentioned in the above-recited contract, shall be immediately paid, pursuant to the terms thereof; And that the timber and wood thereby agreed to be valued, shall be valued accordingly, before the ——— day of ——— next; and the amount of the valuation paid as hereinafter mentioned. And whereas it likewise appears that an indenture of mortgage, dated the ——— day of ———, 18—, and made

comprised all the premises mortgaged by the testator, except such part as he had afterwards conveyed in exchange for tithes and lands.

Recital of defect in title to tithes and lands taken in exchange;

of agreement, that a conveyance should be made of the other parts;

but no conveyance to be made of tithes and lands taken in exchange;

yet purchaser to be entitled to the beneficial enjoyment thereof;

of agreement that purchase-money should be paid, and timber valued, and paid for;

that part of title deeds was missing, and that purchaser should

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between, &c., and divers assignments thereof, which had been made and executed between the said date of such mortgage and the ——— day of ———, 18—, when an assignment of the same was made to the said [*testator*], deceased, are not amongst the title-deeds belonging to the said manor and estate of ———, but are alleged to have been lost or mislaid, and therefore cannot now be delivered to the said [*purchaser*]; on which account it has been agreed that the said [*purchaser*] shall be indemnified as hereinafter mentioned:

be indemnified on that account;

of conveyance to purchaser.

And whereas, by an indenture bearing even date with these presents, and expressed to be made between the said [*daughters*], therein described, of the first part; the said [*vendors*], of the second part; and the said [*purchaser*], of the third part; the said manor or reputed manor, newly-erected capital messuage, and such of the said hereditaments comprised in the above-recited indenture of mortgage, of the ——— day of ———, 18—, as were, with the said portion of tithes and commonable land, agreed to be purchased by the said [*purchaser*], as aforesaid, have, in consideration of the said principal sum of [*mortgage money*] (all interest thereon having been previously paid to the said [*daughters*], parties thereto), expressed to be paid by the said [*purchaser*], and of the sum of £———, (making together the said sum of [*purchase-money*]) to the said [*vendors*], expressed to be also paid by the said [*purchaser*], been conveyed, To the use of the said [*purchaser*], his heirs and assigns. NOW THESE PRESENTS WITNESS, and it is hereby agreed and declared, by and between the said parties hereto, That the said timber and wood upon the manor and premises so conveyed to the said [*purchaser*], his heirs and assigns, as aforesaid, shall be valued (*a*), by or before the ——— day of ——— next ensuing the date hereof, according to the mode prescribed by the above-recited contract, and the amount of such valuation shall be paid or invested and applied in manner following, that is to say; In case a good and indefeasible title be made out and perfected, to the said two-third parts of tithes, and the said ——— acres, ——— roods, and ———

Testatum.

Agreement that timber shall be valued and the money invested;

and if a good title be made to tithes and lands taken in

(*a*) The Court will not enforce the specific performance of an agreement to sell at a valuation, if the price fixed appears to be considerably below the real value: *Parken* v. *Whitby*, Turn. & Russ. 366.

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perches of commonable land, by the said ——— day of ——— next, and the same premises should by that time be conveyed to him the said [*purchaser*], his heirs or assigns, or as he or they should direct: And also in case the said mortgage deed of the ——— day of ———, 18—, and all the missing assignments thereof be found and delivered to the said [*purchaser*], his heirs or assigns, or proper and effectual releases, or acknowledgments, or other evidence be produced to show that the debt secured by the said indenture of mortgage of the ——— day of ———, 18—, was paid off and discharged: And that the said assignment of the ——— day of ———, 18—, was made and executed by the persons entitled to assign such mortgage, and was for the absolute use and benefit of him or them, by or before that time: Then he the said [*purchaser*], shall, on such ——— day of ——— next, pay the full amount of such valuation to the said [*vendors*], without any deduction whatsoever: But in case the said title to the said portion of tithes and commonable lands should not clearly, and to the satisfaction of the said [*purchaser*], be made out and perfected by the said ——— day of ——— next; Or the same mortgage deed of the ——— day of ———, 18—, and all missing assignments, should not be delivered to the said [*purchaser*], as aforesaid; Or such sufficient releases or acknowledgments as aforesaid, or the evidence before mentioned, should not be produced; Then and in each, or any, of such cases, he the said [*purchaser*], shall lay out or invest the amount of the said valuation of timber, in the purchase of £3 per cent. Consolidated Bank Annuities in the names of mutual trustees; who shall from time to time lay out and accumulate the dividends and interest thereof, And stand possessed of and interested in the stock so to be purchased, and the accumulations so to be made as aforesaid; Upon the trusts following, that is to say, Upon trust, in case the said title to the said portion of tithes and commonable land should be so as aforesaid made out by the ——— day of ———, 18—, and the said [*purchaser*], should have been suffered to hold and enjoy the same, and to receive the rents and profits thereof, in the meantime, for his and their own use and benefit, and should have had the said mortgage of the ——— day of ———, 18—, and the missing assignments thereof, or the releases or acknowledgment before mentioned, delivered over to him, or such legal

exchange by a given day;

and mortgage deed and missing assignments be delivered;

or evidence produced to show that they are no incumbrances;

then purchaser to pay the amount of such valuation to the vendors.

But in case all the defects are not cleared by the given day,

purchaser to invest the amount of the valuation of the timber in 3 per cent. consols, in the names of mutual trustees to accumulate;

upon trust, in case defects are cleared by an extended certain day, and purchaser should peaceably enjoy in the meantime,

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evidence produced as aforesaid; To transfer the said stock so to be bought, and the dividends in the meantime arising therefrom, unto them the said [*vendors*]: But if such title should not be made out and perfected by the said ——— day of ———, 18—; Then upon trust, to transfer to the said [*purchaser*], so much of the said stock and dividends as will produce such a sum as the said portion of tithes and commonable lands shall be valued at, by two indifferent persons, who are to estimate the value according to the relative situation of the same, and considering that the said [*purchaser*] is owner of the said manor and estates: one of such indifferent persons to be named by the said [*vendors*], and the other by the said [*purchaser*]: And in case of such two persons not agreeing, then by a third person, to be chosen by the two persons so first chosen for that purpose; Together with any expenses that the said [*purchaser*], may be in the meantime put unto, in consequence of his not having his title now completed thereto; And the residue of the said stock and dividends (provided the missing deeds or releases, or acknowledgments, should be previously delivered as aforesaid, or such evidence as aforesaid produced), shall be thereupon immediately transferred to them the said [*vendors*]: But, if it should happen that the said mortgage deed of the ——— day of ———, 18—, and the missing assignments thereof, or any or either of them, or the releases or acknowledgments before mentioned, should not be delivered to the said [*purchaser*], or such evidence produced as aforesaid, on the said ——— day of ———, 18—, Then such residue to remain vested in the trustees to be named as aforesaid, as an indemnity to the said [*purchaser*] against any loss or damage which he or they might or may otherwise sustain, by reason or in consequence of the said mortgage deed of the ——— day of ———, 18—, or any subsequent assignments, not being now delivered to the said [*purchaser*] as a satisfied security, or otherwise on account thereof, until all the same missing deeds, or the releases, acknowledgments, or evidences before mentioned, shall be delivered or produced as aforesaid: And upon those things being severally done, Then upon the said [*purchaser*], being reimbursed all damages and expenses, if any, which he or they may have sustained by reason of the non-delivery of the same missing deeds upon the execution

to transfer the stock and the dividends to vendors;

but otherwise,

upon trust to transfer to purchaser so much of the stock as the tithes and lands shall be valued at, with purchaser's expenses;

and the residue of the stock and dividends, if title should be cleared, paid to vendors.

But if not,

then residue of stock to remain in trustees, as an indemnity to purchaser.

When purchaser reimbursed all damages on account of defect, to transfer stock to vendors.

XX. On a Purchase with a Defective Title.

of these presents, or in any manner respecting the same deeds, such trustees may lawfully, and are hereby authorized to, transfer the same stock and dividends to the said [*vendors*]. And if it should happen that a good and indefeasible title shall be made out and perfected to the said two-third parts of tithes, and the said ——— acres, ——— roods, and ——— perches of commonable land, by the said ——— day of ———, 18—, but the said missing deeds, or any of them, shall not be delivered as aforesaid; or the releases, acknowledgments, or evidences, shall not be delivered or produced as aforesaid; Then the said stock and dividends shall, notwithstanding such title being made as aforesaid, remain vested in the trustees to be named as aforesaid, as an indemnity to the said [*purchaser*], against any loss or damage which he or they might or may otherwise sustain, in consequence of the said mortgage deed of the ——— day of ———, 18—, or any subsequent assignment thereof, not being now delivered to the said [*purchaser*], as a satisfied security, or otherwise on account thereof, until all the same missing deeds, or the releases, acknowledgment, or evidence before mentioned, shall be delivered or produced as aforesaid. And upon those several things being done, and the said [*purchaser*], being reimbursed all damages and expenses, if any, which he or they may have sustained, by reason of the said mortgage of the ——— day of ———, 18—, and any assignments not being delivered as aforesaid as satisfied securities, such trustees may lawfully, and are hereby authorized to, transfer the same to the said [*vendors*]. And the said [*vendors*] do hereby, jointly and severally, covenant and agree with the said [*purchaser*], That they the said [*vendors*], or one of them, or the person or persons claiming under them, will forthwith use their utmost endeavours to find the said mortgage of the ——— day of ———, 18—, and all missing assignments thereof, and upon the same deeds, or any of them, being found, will immediately deliver them to the said [*purchaser*], or the person or persons claiming under him, for his or their own use and benefit. (*a*)

If the first defect be cleared, still the whole funds to be invested as an indemnity against the other defects.

Covenant by vendors to use their utmost endeavours to find the deeds missing, and deliver them to purchaser.

In witness, &c.

(*a*) This and the two following precedents, which may be found useful under special circumstances, are taken almost *verbatim* from the third edition of this work, with the omission of obsolete clauses and superfluous words.

XXI. *AGREEMENT by a Vendor to* REPURCHASE *Premises if required by the Purchaser within a limited Period, in case the* TITLE DEEDS *are* NOT FOUND *in the meantime.*

Parties.

ARTICLES OF AGREEMENT made the ——— day of ———, 18—, BETWEEN [*vendor*] of &c., of the one part, and [*purchaser*] of &c., of the other part.

Recital of purchase,

WHEREAS the said [*purchaser*] has purchased of the said [*vendor*] a certain messuage or tenement, garden and premises, situate at ———, in the county of ———, and the inheritance thereof in fee simple, at the price of £———;

and conveyance in fee.

And by an indenture dated the ——— day of ——— instant, and made between the said [*vendor*] of the one part, and the said [*purchaser*] of the other part; the said [*vendor*] has, in consideration of the said sum of £———, granted and conveyed the said messuage and premises, with their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns:

Recital of the loss of title-deeds, and agreement for repurchase in case they should not be found within a limited period.

AND WHEREAS the title-deeds and writings relating to the said premises have been lost or mislaid, and previously to the completion of the said purchase and payment of the said sum of £———, it was agreed between the said parties, that the said [*vendor*] should enter into the covenants and stipulations hereinafter contained, and on his part to be observed and performed, for the repurchase of the said messuage and premises at the price of [*purchase-money*], and otherwise in relation to the premises, in manner hereinafter appearing.

Testatum.

NOW THESE PRESENTS WITNESS, and it is hereby agreed and declared between and by the parties hereto, and the said [*vendor*] hereby covenants with the said [*purchaser*], that in case the said [*purchaser*], his heirs, or assigns (*a*), shall at any time after the expiration of three years, and within the space of nine years, to be computed from the date hereof, be desirous to sell the same messuage and premises comprised in the said indenture of even date herewith, and of such his or their desire shall give unto the said [*vendor*], his heirs, executors, or administrators (*a*), or leave at his or their usual place of residence, six calendar months'

Covenant by vendor, that if purchaser should require him to purchase premises within a limited period, before the deeds are found,

(*a*) For these words may be substituted throughout:—
"or the person or persons claiming under him."

XXI. To Repurchase if Title-Deeds are not found.

notice in writing, Then and in such case, and at the expiration of the six calendar months for which such notice shall be given, if the deeds and writings mentioned in the first schedule hereunder written should not previously thereto have been found and delivered to the said [*purchaser*], his heirs, or assigns, whole and undefaced, he the said [*vendor*], his heirs, executors, or administrators, shall purchase the said messuage and premises, of and from the said [*purchaser*], his heirs or assigns, at the price of £———: AND THE SAID [*purchaser*] hereby agrees that on payment of the said sum of £———, pursuant to the aforesaid agreement, he the said [*purchaser*], his heirs or assigns, and all other persons claiming through or under him, shall, at the request, costs, and charges of the said [*vendor*], his heirs, executors, or administrators, convey the said messuage and premises, with the appurtenances, unto and to the use of the said [*vendor*] and his heirs, or as he or they shall direct or appoint, free from incumbrances: And further that in case the said [*vendor*] his heirs, executors, or administrators, shall be called upon to repurchase the said messuage and premises, in pursuance of the agreement hereinbefore for that purpose contained, the same premises shall, at the time of such repurchase, be in good and tenantable repair; And upon the completion of such purchase, the same premises, together with the several fixtures mentioned in the first schedule hereunder written, shall be delivered to the said [*vendor*], his heirs or assigns, in as good order and condition, in all respects, as the same now are: PROVIDED ALWAYS, that these presents shall not, nor shall the above-recited indenture of the ——— day of ———, 18—, be considered, construed, or taken to be a mortgage or security for money, or anything in the nature of a mortgage or security for money; nor shall the same give, or be construed to give, unto the said [*vendor*], his heirs, executors, administrators, or assigns, any right, title, or equity, to redeem the said premises, upon payment of the said purchase-money or sum of £———, with interest: PROVIDED ALSO, that in case the deeds and writings mentioned in the second schedule hereunder written shall, previously to any such notice as aforesaid, or to the expiration of the said six calendar months, for which such notice shall be given or left as aforesaid, be found and delivered to the said [*purchaser*], his heirs or assigns, whole

he will purchase accordingly, at the sum now paid by purchaser.

Agreement by purchaser to convey accordingly.

Premises at the time of repurchase to be in good repair,

and fixtures in schedule in as good state as at present.

Agreement not to be deemed a mortgage.

In case the deeds should be delivered, agreement to be void.

XXI. To Repurchase if Title-Deeds are not found.

and undefaced; Then, and in such case, these presents, and every thing herein contained, shall cease and be void.

In witness, &c.

The First Schedule to which the above-written Agreement refers.

The Second Schedule to which the above-written Agreement refers.

XXII. *AGREEMENT between the Vendors and Purchaser of an Estate in Fee-simple,* to refer to Arbitration *the Question whether certain* Lands were included in the Contract; *and what* Compensation *the Vendors should receive in consequence of part of the premises being discovered to be of a Leasehold Tenure: (very specially drawn).*

ARTICLES OF AGREEMENT, made the ——— day of ———, 18—, Between [*three vendors*], of &c. (devisees in trust, and executors named in the will of [*testator*], late of &c., esquire, deceased), of the one part; and [*purchaser*], of &c., of the other part.

Parties.

Recital of contract for sale of certain premises in fee.

WHEREAS the said [*vendors*], as devisees in trust as aforesaid, in the year 18—, by writing under their hands, contracted with the said [*purchaser*] for the absolute sale to him of the several manors of ——— and ———; and of divers farms, lands, and hereditaments, situate in the county of ———, and the inheritance thereof, in fee-simple, at the price of £———; Among which hereditaments so contracted to be sold are included a farm and lands called Acre Farm; and also certain lands called Evergreen Lands; and also a house and gate-room hereinafter mentioned; which sale so made to the said [*purchaser*] has not yet been completed.

Recital of agreement to relinquish part of premises, and allow proportion of rent, on having a compensation.

And whereas the whole of the said farm and lands called Acre Farm, and now let upon lease, under the yearly rent of £———, is included in the contract for the sale, so agreed to be made to the said [*purchaser*] as aforesaid; and as the said [*purchaser*], at the request of the said [*vendors*], hath consented and agreed, that such part of the said farm called Acre Farm, and containing ——— acres, ——— roods, and ——— perches, or thereabouts, as is specified in the schedule hereunder

written, shall be discharged from the said contract, and that the said [*purchaser*] shall be allowed out of the said purchase-money a compensation for the loss of the part so discharged; and that the said [*purchaser*] should be entitled to the yearly rent of [*apportioned rent*], to be paid in respect of the part of Acre Farm aforesaid, which is retained by, and intended to be conveyed to the said [*purchaser*], as the apportioned part of the said yearly rent of [*whole rent*]. And whereas it has been agreed between the said [*vendors*] and [*purchaser*], that the value of the lands specified in the schedule hereunder written, being part of Acre Farm aforesaid, shall be ascertained by two indifferent persons, one of whom shall be chosen by the said [*vendors*], and the other of them by the said [*purchaser*]; and that in case such two persons shall not agree in their valuation, then the same shall be ascertained by such one person as the said two first referees shall for that purpose appoint; and the value of the said lands so to be ascertained shall be deducted by the said [*purchaser*], out of his said purchase-money, by way of compensation. And whereas by an indenture dated the ——— day of ———, and expressed to be made between [*one of the lessors*], of &c., widow, of the first part; [*the other lessor*], of &c., spinster, of the second part; and [*lessee*], of &c., of the third part; Reciting a license bearing date the ——— day of ———, under the hand of the deputy steward of the manor of ———, to the said [*first-named lessor*], to let to farm to the said [*lessee*] her moiety of the cottage at ———, in the manor aforesaid, for the term of twenty-one years from the 29th day of September then last, if the said [*first lessor*] should so long live; And also a license dated the ——— day of ———, under the hand of the said deputy steward of the same manor, to the said [*first lessor*], to let to farm to the said [*lessee*], a moiety of one barn and gate-room, and half a yard of land, called the ———, containing ——— acres; And also a moiety of a close of land called ———, containing ——— acres; And also a moiety of those four closes of land, containing ——— acres, called ———, in the manor aforesaid, for the term of twenty-one years from the 29th day of September then last, if the said [*first lessor*] should so long live; And also, a license dated the ——— day of ———, under the hand of the said deputy steward, to the said [*second lessor*], to let to farm unto the

XXII. On Purchase, to refer Disputes to Arbitration.

Recital of agreement to leave value of premises relinquished to arbitration, or umpirage.

Recital of lease of copyhold lands by two tenants in common for life, for twenty-one years, if they should respectively so long live, with separate deputy steward.

XXII. On Purchase, to refer Disputes to Arbitration.

said [*lessee*] her moiety of the aforesaid cottage in ———, for the term of twenty-one years from the 29th day of September then last, if the said [*second lessor*] should so long live; And also, a license dated the ——— day of ———, under the hand of the said deputy steward, to the said [*second lessor*], to let to farm to the said [*lessee*] her moiety of the hereinbefore mentioned barn and gate-room, and half a yard of land called ———; And also one moiety of a close of land called ———, containing ——— acres; And also, a moiety of the said four closes of land called ———; for the term of twenty-one years from the ——— day of September then last past, if the said [*second lessor*] should so long live; And further reciting, that the said [*lessors*] were entitled to one moiety each of and in All that meadow or pasture ground, containing by estimation ——— acres, lying and being in ——— aforesaid, and then in the tenure or occupation of ———, during the term of their natural lives; It was witnessed, that the said [*lessors*] did demise, and to farm let unto the said [*lessee*], All their aforesaid undivided moieties of and in the several copyhold messuages and tenements above mentioned; And all their aforesaid undivided moiety, or half part each, of and in All that meadow or pasture ground above mentioned; All which premises were then in the tenures or occupations of the said [*lessee and others*]; To hold the same unto the said [*lessee*], his executors, administrators, and assigns, from the 29th day of September then last past, for the term of twenty-one years, if the said [*first lessor*] and [*second lessor*] should so long live; At the yearly rent of £———, payable half yearly, as therein mentioned; And subject to the covenants and agreements therein contained. And whereas the lease granted to the said [*lessee*], as aforesaid, was so granted to him in trust for the said [*testator*], deceased. And whereas the said [*purchaser*] contends, that the premises hereinbefore mentioned to be comprised in the said indenture of lease, of the ——— day of ———, are included, or were intended to be comprised in the contract for sale, so made between him and the said [*vendors*], as aforesaid; And the said [*purchaser*] claims a compensation, to be deducted out of his said purchase-money, and the amount thereof to be settled as hereinafter mentioned, for the difference in value in the same premises, between a freehold and

Recital, that lease was granted in trust for testator.

Recital of difference between vendors and purchaser, whether leaseholds were included in contract.

XXII. On Purchase, to refer Disputes to Arbitration.

leasehold tenure; But as the premises are not by express words named in the said contract for sale, the said [*vendors*] contend that the said leasehold premises do not, nor were intended to constitute any part of the estate so contracted to be sold to the [*purchaser*] as aforesaid. And whereas, in order to put an end to all disputes between the said parties, touching the said leasehold premises, it has been agreed between them that it shall be left to two indifferent persons to determine, upon the statements of the parties, and upon such evidence or information, and by such other ways and means as they shall think proper, whether the aforesaid leasehold premises were originally intended, or ought, under the circumstances of the case, to be included or considered as included in the aforesaid contract, one of which persons is to be chosen by the said [*vendors*], and the other by the said [*purchaser*]; And in case such two persons cannot agree in their determination, then the same shall be referred to and determined by such one person as the said two referees shall for that purpose appoint. And whereas a similar dispute has arisen between the said parties respecting a freehold piece or parcel of ground called the Coppice, near the ———, and containing ——— acres, ——— roods, and ——— perches, it being contended by the said [*purchaser*] that the same is or ought to be included in the said contract; and it hath been in like manner agreed, that it shall be left to the said two persons, or their umpire, to determine whether the same were originally intended, or ought, under the circumstances of the case, to be considered as included in the said contract. And whereas by an indenture, dated the ——— day of ———, 17—, and made between [*lessor*] of the one part, and [*lessee*] of the other part, For the consideration therein expressed, the said [*lessor*] demised unto the said [*lessee*] All that messuage, with the barn and gate-room thereunto adjoining and belonging, situate in the parish of ———, in the said county of ———, then late in the occupation of ———, with the appurtenances; To hold the same unto the said [*lessee*], his executors, administrators and assigns, for and during the term of five hundred years from the date thereof, under the yearly rent of a pepper-corn; And by mesne assignments and other acts, good and available in the law, the said messuage, with the barn and gate-room thereunto adjoining and belonging, became vested in the said

Recital of agreement to refer same to arbitration,

or umpirage.

Recital of a similar dispute as to other lands.

Recital of agreement, to leave same to arbitration.

Recital of lease of other premises for five hundred years;

by mesne assignments vested in testator.

XXII. On Purchase, to refer Disputes to Arbitration.

[*testator*], deceased. And whereas by an indenture dated the ——— day of ———, and made between the Dean and Chapter of the Cathedral Church of ———, of the one part; and [*lessee*], of the other part; The said Dean and Chapter, for the consideration therein mentioned, demised unto the said [*lessee*] All that barn, and all those several lands and tenements, with the appurtenances, called Evergreen, situate in the parish of ———, in the county of ———, containing by estimation ——— acres, that is to say; All those two pieces of meadow ground, with a barn standing in one of them, lying between a meadow belonging to the manor of ———, on the north part, a meadow formerly of ———, deceased, on the north-west part, and a close of arable land, part of those lands called Evergreen, on the south-west part, containing by estimation ——— acres; two closes of arable land, with a lane, there called Evergreen Lane, having ——— park on the east, and one of the aforesaid two inclosures of meadow ground on the north part, and one of the last-mentioned two closes of arable on the east part, containing by estimation ——— acres; To hold the same unto the said [*lessee*], her executors, administrators, and assigns, from the 29th day of September then last past, for the term of twenty-one years, Under the yearly rent, and subject to the covenants therein contained, and on the part of the lessee to be paid and performed. And whereas by mesne assurances and other acts in the law, the barn, lands, and premises comprised in the lastly hereinbefore-recited indenture of lease, became vested in the [*testator*], deceased, for the residue of the said term of twenty-one years. And whereas the premises hereinbefore mentioned to be comprised in the above-recited indentures of the ——— day of ———, and the ——— day of ———, and the terms of five hundred years, and twenty-one years, thereby respectively created, are admitted by the said [*vendors*] to form a part of the estate and hereditaments so contracted to be sold to the said [*purchaser*], as aforesaid; But inasmuch as the hereditaments so contracted to be purchased by the said [*purchaser*] were considered by him and the said [*vendors*] to be of a freehold tenure in fee-simple; and the amount of the consideration money to be paid by the said [*purchaser*], for the purchase of the same, having been calculated upon the supposition that the whole of the said estate and hereditaments were

Recital of lease of other premises from a Dean and Chapter,

by mesne assignments vested in testator.

Recital that premises comprised in two last-recited leases are part of the premises contracted to be purchased as freehold.

XXII. On Purchase, to refer Disputes to Arbitration.

to be conveyed to him in fee-simple, it has been agreed between the said parties hereto that the said [*purchaser*] shall be entitled to retain, by way of compensation out of his said purchase-money, the difference in value in respect to the premises comprised in the above-recited indentures of lease of the ——— day of ———, 18—, and ——— day of ———, 18—; and also in respect to the premises comprised in the said indenture of lease of the ——— day of ———, 18—, in case it should be ultimately determined that the same ought to be considered as included in the said contract for sale as aforesaid, between the leasehold tenure, by which the same premises are respectively holden, and the inheritance in fee-simple of the same premises respectively; and that the amount of such difference in value shall be fixed and determined in manner hereinafter appearing. NOW THESE PRESENTS WITNESS, that, in consideration of the premises, IT IS HEREBY AGREED AND DECLARED between and by the said parties hereto, in manner following, that is to say; THAT the said [*arbitrators*] shall be arbitrators for determining the several matters and things in these presents referred to them, and that they shall determine the same respectively as soon as conveniently may be after the execution of these presents (*a*); AND THAT in case they shall not agree to determine any matter or thing, hereby referred to them, the matter or thing, of which they shall not agree, shall be referred to and determined by such one person as they the said [*arbitrators*] shall for that purpose appoint; and such appointment of umpire to be from time to time made as soon as conveniently may be after such difference of opinion shall from time to time arise: THAT the value of the lands mentioned in the schedule hereunder written, being part of Acre Farm aforesaid, calculating such value at ——— years' purchase, at the improved yearly rent thereof, shall be forthwith, as soon as may be, ascertained and determined by the said [*arbitrators*]; or, in case they

Recital of agreement, to allow compensation on account of difference between leasehold and freehold tenure, and to leave same to arbitration or umpirage.

Testatum.

Appointment of arbitrators.

In case of difference, arbitrators to appoint umpire.

Land relinquished, to be calculated at —— years' purchase, by arbitrators or umpire.

(*a*) The questions of the powers and duties of arbitrators and umpires, and of the proceedings before them, and of the time for making an award, and mode in which it should be made, will be fully examined in Vol. II., tit. "ARBITRATIONS," where precedents of submissions, awards, and other documents relating to arbitrations will be found.

XXII. On Purchase, to refer Disputes to Arbitration.

differ, by their umpire, to be chosen as aforesaid: That for the purpose of making such valuation, the said referees shall previously fix and determine, by such ways and means, and upon such information, as they or he shall think fit, the best and most improved yearly rent at which the said lands mentioned in the said schedule ought to be, or to have been, or might have been, let at the date of these presents; and the calculation of such value shall be made upon such improved rent: That the value so to be fixed and ascertained by the said referees, or their umpire, shall be allowed to and retained by the said [*purchaser*] by and out of his said purchase-money, or sum of £———: And that the said [*purchaser*], his heirs and assigns, shall be entitled to the yearly rent of [*apportioned rent*], as the apportioned part of the aforesaid yearly rent of [*whole rent*], to be payable in respect to so much and such part of Acre Farm aforesaid as are not mentioned and comprised in the said schedule hereunder written: That the said [*arbitrators*], or, in case they differ, their umpire, to be chosen as aforesaid, shall, as soon as conveniently may be after the execution of these presents, determine whether the leasehold premises hereinbefore mentioned to be comprised in the said indenture of lease of the ——— day of ———, and the said freehold coppice near the ———, or either of them, and any and what part or parts thereof respectively, are or is, or ought to be considered as included in and bound by the said contract for sale so entered into between the said parties hereto as aforesaid: That the said [*arbitrators*], or in case they differ, their umpire, to be chosen as aforesaid, shall forthwith, as soon as may be, ascertain and determine what is the difference in value in respect to the premises holden under or by virtue of the said indentures of lease or demise of the ——— day of ———, 17—, and the ——— day of ———; and also in respect to the premises comprised in the said lease of the ——— day of ———, in case the last-mentioned premises should be determined to be bound by and included in the said contract for sale as aforesaid between the leasehold tenures, under or by which the premises comprised in the same indentures are respectively holden, and the fee-simple of the same premises respectively: considering in the calculation of such difference in value, the duration of the several terms of years, and the rents, covenants, provisoes,

Improved annual rent to be ascertained,

and the value allowed purchaser.

Referees, or umpire, to ascertain land included in contract,

and determine difference in value, between leasehold and freehold tenure.

XXII. On Purchase. to refer Disputes to Arbitration.

and agreements, under or by which the said leasehold premises are respectively held, by virtue of the said indentures of lease respectively: THAT the amount and value so to be awarded and determined as the difference in value between a leasehold tenure, and a freehold tenure in fee-simple, shall be retained and deducted by the said [*purchaser*], his heirs, executors, administrators, or assigns, by way of compensation, by and out of the said purchase-money or sum of £———: THAT the award and determination of the said [*arbitrators*], or of their umpire, in or about the premises, or any of them, shall be final and conclusive, between and upon the said [*vendors*], and all persons claiming through or under the said [*testator*], deceased, and the said [*purchaser*], his heirs, executors, administrators, and assigns: THAT for the purposes aforesaid, it shall be lawful for the said [*arbitrators*], or their umpire, to obtain information upon or in respect of the premises hereby referred, or any of them, either by the statements of the parties hereto, or any of them, by parol or written evidence, or by such other ways or means as they or he shall in their or his judgment think most advisable, or deem most applicable to the nature and circumstances of the case: THAT in case the said [*arbitrator*, A. B.] should die, or refuse or become incapable to act as arbitrator, before the whole of the premises hereby referred shall be determined by the said [*arbitrators*], or their umpire, Then the said [*vendors*], or the survivors or survivor of them, or the heirs, executors, administrators, or assigns of such survivor, shall forthwith thereafter nominate and appoint some other person to be arbitrator or referee in the stead and place of the said A. B.; and so in like manner upon the decease, or neglect or refusal to act, of any arbitrator succeeding to the place of the said A. B. (*add a similar clause as to* C. D. *purchaser's arbitrator*): THAT every arbitrator, so to be appointed as a substitute for the said A. B. or C. D., or any succeeding arbitrator, shall, as to such of the premises as shall not, at the time of his nomination and appointment be actually determined, or referred to an umpire, have the same powers and authorities as are hereby vested in the arbitrator, in or to whose place he shall come or succeed: THAT the expense of preparing and executing these presents, [and a duplicate hereof], and of making such arbitration or award as afore-

Difference in value to be retained by the purchaser.

Award of arbitrators or umpire to be final.

Arbitrators or umpire to obtain evidence by parol, or in writing.

In case of death of vendors' arbitrator before award, they to appoint another.

Same as to purchaser's. New arbitrators to have same powers as the old arbitrators.

Expense of arbitration to be paid equally.

XXII. On Purchase, to refer Disputes to Arbitration.

said, or otherwise attending the submission hereby made, shall be borne and paid by the said parties in the proportions following, that is to say: one moiety thereof by the said [*vendors*], as such trustees as aforesaid; and the other moiety by the said [*purchaser*]: AND LASTLY, the submission and agreement hereby made shall be made a rule of her Majesty's High Court of Justice, on the application of either of the said parties. IN WITNESS whereof the said parties have hereto set their hands and seals, the day and year first above written.

Submission to be made a rule of Court.

Schedule.

THE SCHEDULE TO WHICH THE ABOVE-WRITTEN AGREEMENT REFERS.

XXIII. *AGREEMENT between the* DEAN AND CHAPTER *of a Cathedral, and a* LESSEE *of Lands held under the Dean and Chapter, and a* HUSBAND *and* WIFE, *seised in right of the Wife of an* ADJOINING ESTATE, *in Fee, to* REFER *the settlement of the* BOUNDARIES *of the Premises held by the two Parties respectively to a* REFEREE (*a*).

THIS INDENTURE, made the ——— day of ———,

Parties.

BETWEEN the Dean and Chapter of the Cathedral Church

Stat. 2 & 3 Will. 4, c. 80. Boundaries of church property. Royal Assent, 3rd Aug. 1832.

(*a*) The stat. 2 & 3 Will. 4, c. 80, intituled "An Act to authorize the identifying of Lands and other Possessions of certain Ecclesiastical and Collegiate Corporations," after reciting that "the archbishops and bishops of the several dioceses, and the deans, and deans and chapters, archdeacons, prebendaries, and canons, and other dignitaries and officers of the several cathedrals and collegiate churches and chapels, and the masters or other heads, and fellows and scholars or other societies of the several colleges and halls in the universities of Oxford and Cambridge, and of the colleges of Winchester and Eton, are proprietors of divers manors, messuages, lands, tenements, tithes, and hereditaments; and in many cases the boundaries or quantities and the identity of lands within such manors, and of such messuages, lands, tenements, and hereditaments, and of lands subject to any such

of ———, in ———, of the first part; [*lessee*], of, &c. of the second part; and [*husband*], of &c., and [*wife*], his wife, of the third part (*b*).

XXIII. Agreement to settle Disputed Boundaries of Church Lands.

tithes, or some part or parts thereof, are unknown or disputed, and it would be a great benefit, as well to such proprietors respectively, as to their lessees, copyhold or customary tenants, sub-lessees, or under-tenants, their, his, or her heirs, executors, administrators, or assigns, if the said manors, messuages, lands, tenements, tithes, and hereditaments were identified and the boundaries and quantities thereof ascertained and finally settled:" enacts, sect. 1, "that from and after the passing of this Act it shall and may be lawful to and for any archbishop, bishop, dean, dean and chapter, or other corporation aggregate or sole hereinbefore mentioned, to enter into an agreement of reference or deed of submission with his or their lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, his, her, or their heirs, executors, administrators, or assigns, or with the owner or owners of any other hereditaments adjoining to or intermixed with the said manors, messuages, lands, tenements, tithes, or hereditaments, whereby it shall be agreed that any unknown or disputed boundaries or quantities of such manors, messuages, lands, tenements, tithes, or hereditaments, or any part thereof, shall be referred to the adjudication of such person or persons as may be agreed upon and named by the said archbishop, bishop, dean, dean and chapter, or other corporation aggregate or sole, and by his or their lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, his, her, or their heirs, executors, administrators, or assigns, or by such owner or owners of any other hereditaments situate as aforesaid; and that such referee or referees shall be fully authorized to make or cause to be made surveys, maps, and admeasurements of the said manors, messuages, lands, tenements, tithes, and hereditaments, or any part thereof, and to summon any persons as witnesses, and examine them on oath (which oath he or they are hereby authorized to administer) touching or concerning any of the matters or things so referred as aforesaid, or in any way relating thereto: and also to call for the production of all surveys, maps, deeds, books, papers, and writings in the custody or power of any of the parties to the said reference, or of any other person or persons, of or concerning the matters in question; and the said referee or referees, having well and sufficiently investigated and considered the same, and all matters to him or them referred, shall and may make his or their award or awards in writing, under his or their hand and seal or hands and seals, with a map or maps drawn thereupon or thereunto annexed, and which said award or awards and map or maps shall be upon parchment or vellum, and shall award and determine, identify, delineate, and

Archbishops, bishops, deans and chapters, &c. may enter into agreements or deeds of reference with their lessees, to ascertain and settle unknown or disputed boundaries or quantities of manors, &c.

Referees to make surveys, maps, and admeasurements; to summon and examine witnesses on oath,

to call for all deeds, &c.;

to make awards, with maps thereto, on parchment or vellum.

(*b*) If the consent of any spiritual superior is requisite (see 2 & 3 Will. 4, c. 80, s. 2), such person should be made a party.

XXIII. **Agreement to settle Disputed Boundaries of Church Lands.**

WHEREAS by an indenture of lease, dated the ——— day of ———, and expressed to be made between the said ———

describe the boundaries, quantities, particulars, and situations of the said manors, messuages, lands, tenements, tithes, and hereditaments, so referred to him or them as aforesaid; and the said award or awards and map or maps shall be laid before all the parties to any such agreement of reference or deed of submission, including the party or parties whose consent is required by this Act, whose approbation thereof shall be written upon the said award or awards and shall be signed and sealed by them, and thereupon the said award or awards and map or maps shall be for ever afterwards binding upon all parties, and final and conclusive as to all matters therein contained or thereby referred to."

Awards and maps to be laid before parties, and their approbation to be written thereon.

Certain consents required to render valid proceedings under this Act.

Sect. 2. "That in every case in which any of the powers hereinbefore contained shall be exercised by any bishop, dean, archdeacon, prebendary, or other ecclesiastical corporation sole, the deed of submission or agreement of reference, and also the approbation of the award, shall, in the case of a bishop, be executed by the archbishop of the province testifying his consent thereto; or, in case of a dean, the same shall be executed by the dean and chapter testifying their consent thereto; or, in the case of an archdeacon, prebendary, or other ecclesiastical corporation sole, the same shall be executed by the archbishop or bishop of the diocese testifying his consent thereto."

Power to tenants for life, infants, married women, lunatics, &c. to enter into reference.

Sect. 3. "That from and after the passing of this Act it shall and may be lawful to and for the said lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners as hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, who at the time of making any reference authorized by this Act, shall be tenant or tenants in fee tail, general, or special, or for life or lives, and for the guardians, husbands, committees, or attornies, of or acting for any such lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners as hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, who, at the time of making any such reference, shall be respectively an infant or infants, *feme covert* or *femes covert*, or of unsound mind, or beyond the seas, or under any other legal disability, or otherwise disabled to act for themselves, himself, or herself, to sign, seal, and deliver any agreement of reference or deed of submission or approbation of any award or awards and map or maps authorized by this Act to be made, as fully and effectually to all intents and purposes as if such lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners, as hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, had been tenant or tenants in fee simple, and of full age, sole, of sound mind, or within the realm of England, and not under any other legal disability."

Dean and Chapter of ———, of the one part; and the said [*lessee*], of the other part; for the considerations therein

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Recital of lease by Dean and Chapter.

Sect. 4. "That immediately after the execution by the parties of the instrument showing their approbation of any award to be made by virtue of this Act, the agreement of reference or deed of submission, and also the award or awards and map or maps, authorized to be made by this Act, and a copy of the minutes of evidence whereupon the same is made, shall be deposited, in the case of any reference by any archbishop or bishop, in the office of their own registrar; and in case of any reference by any dean, dean and chapter, archdeacon, prebendary, canon, and other dignitary and officer of a cathedral or collegiate church or chapel, in the office of the registrar of the dean and chapter thereof; and in case of any reference by any masters or other heads, or by any fellows and scholars, or other societies hereinbefore named, in the office of the steward or other proper officer of their said colleges and halls; and every such registrar, steward, or other officer, or some person or persons on his behalf, shall produce the documents and papers so deposited with him, or any of them, at all proper and usual hours of business, to every person interested in the subject matter of such award, or to his or her agent duly authorized, who shall make application to inspect the same or any of them, and shall furnish a copy or copies of the same or any of them to every such person or agent who shall make application for such copy or copies; and every such registrar, steward or other officer, shall in every case be entitled to the sum of five shillings and no more for receiving and preserving the agreement of reference or deed of submission, award or awards, map or maps, and copy of the minutes of evidence as aforesaid; and the sum of one shilling and no more for every production of the same, or any of them, to be inspected; and the sum of sixpence and no more for every folio containing seventy-two words of every copy; and the sum of ten shillings and no more for every copy of a map so made as aforesaid."

Agreement or deeds of reference, awards and maps, to be deposited in registry of archbishop, bishop, &c.

Documents to be produced for inspection.

Registrar's fees.

Sect. 5. "That the expenses attending every reference which shall be made under the authority of this Act, and all the proceedings hereby required relating to the same, shall be paid and borne by the parties thereto in such manner, shares, and proportions as they shall agree; and in case the said parties shall not make any agreement relating to such expenses, then all such expenses, or so much thereof as shall not be provided for by such agreement, shall be paid and borne by the said parties in equal moieties."

Expenses of reference how to be paid.

Sect. 6. Act to extend only to England and Wales.

The jurisdiction of equity in granting commissions to ascertain boundaries, which in its origin was exercised only on consent of both parties, is not very well defined: it is agreed that there must be some equitable ground for the relief beyond the mere fact that the boundaries are confused; but it is not easy to collect from the cases any general principle by which to ascertain what are or not sufficient grounds for equitable interference.

Jurisdiction of equity to settle boundaries.

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mentioned, the said Dean and Chapter demised unto the said [*lessee*] All (*transcribe the description of parcels from the lease*),

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In *Wake* v. *Conyers*, 1 Eden, 331 (where the learned reporter has collected all the older cases), *S. C.* 2 Cox, 360, the bill was filed to ascertain the boundary of two manors which lay in the midst of a freehold estate belonging to the defendant, who was also lord of one of the manors, and who, the bill alleged, had cut down trees in his part which indicated the boundary.

Boundaries of a manor.

Lord Keeper *Henley*, in dismissing the bill, observed that there was no precedent of fixing boundaries of an incorporeal inheritance, and that these writs were far from deserving encouragement. All the cases have been where the the soil itself was in question, or where there might have been a multiplicity of writs.

Jurisdiction must be founded on some equity arising from the defendant's acts.

The Court has no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties; as some particular circumstance of fraud or confusion, where one party has ploughed too near the other, or the like. See *Metcalfe* v. *Beckwith*, 2 P. Wms. 376.

Boundaries of a parish.

In *Atkins* v. *Hatton*, 2 Anstr. 386, a bill by the rector of a parish seeking an account of tithes and a commission to settle the boundaries of the parish and the glebe, was dismissed; the Court observing, that the presumption that all the lands which should be found within the parish would be titheable to the plaintiff was by no means conclusive, and there was no instance of a commission being granted in order to obtain a remote consequential advantage.

In the case of *St. Luke's, Old Street* v. *St. Leonard's, Shoreditch*, 1 Br. C. C. 40; *S. C.* nom. *Waring* v. *Hotham*, 2 Dick. 550, cit. 2 Anstr. 395, an issue was asked to settle the boundaries of two parishes; but Lord *Thurlow*, C., said that if he should direct an issue in such a case as this, he did not see what case would be peculiar to a court of law. Where there was a common right to be tried, such a proceeding was to be understood. That was the case where the tenants of a manor claim a right of common by custom, because the right of all the tenants of the manor is tried by trying the right of one; but in this case he saw no common right which the parishioners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom on account of the poor laws. *He apprehended these issues had been usually directed by consent of the parties.*

Confusion of boundaries, caused by unity of possession.

In *Speer* v. *Crawter*, 17 Ves. 216; 2 Mer. 410, a bill to settle boundaries was brought by the lord of the manor of W. against the lord of the adjoining manor of J. (who was lessee of the manor of W.), and against commissioners under an inclosure Act, alleging confusion of boundaries, arising out of the unity of possession; and that the defendants were preparing, by combination together, to set out a boundary of the manor of J., which would include lands belonging to W. The defendant, by his answer, set out boundaries, referring to perambulations made previously to the union of possession; and the lease having expired since the filing of the bill, and there being no proof that any confusion of boundaries had been occasioned by the default

from the ——— day of ———, 18—, for the term of eighteen years, at the rent, and subject to the covenants and

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of the lessees of W., the bill was dismissed by Sir *W. Grant*, M.R., who said (p. 417): "On what principle can a Court of Equity interfere between two independent proprietors, and force one of them to have his rights tried and decided in any other than the ordinary legal mode in which questions of property are to be decided? In some cases, certainly, the Court has granted commissions or directed issues, on no other apparent grounds than that the boundaries of manors were in controversy. In *Wake* v. *Conyers*, 2 Cox, 36, however, Lord *Northington* held that it was in the case of manors that the exercise of the jurisdiction, which he says had been assumed of late, was peculiarly objectionable. He refused either to grant a commission, or to direct an issue. So did Lord *Thurlow* in the case of two parishes. In the same case of *Wake* v. *Conyers*, Lord *Northington* says, that in his apprehension this Court has simply no jurisdiction to settle the boundaries even of land unless some equity be superinduced by act of the parties. I concur in that opinion, and think that the circumstance of a confusion of boundaries furnishes *per se* no ground for the interposition of the Court." See also *Lethieullier* v. *Lord Castlemain*, 1 Dick. 46; Sel. Ch. Ca. 60; 2 Eq. Ab. 161.

Boundaries.

If the owner of lands subject to a rent or service confuse the boundaries so as to prevent a distress, the owner of the rent or service may have a commission; 1 Ch. Cas. 145; 1 Br. C. C. 201; 1 Ves. sen. 172: *Duke of Leeds* v. *Earl Strafford*, 4 Ves. 180.

Distress prevented by confusion of boundaries.

Where a confusion has been caused by the conduct of the tenant, the jurisdiction will be exercised, although no fraud appears to have been intended. *Att.-Gen.* v. *Fullerton*, 2 Ves. & B. 263. See *Loker* v. *Rolle*, 3 Ves. 4: *Ashton* v. *Lord Exeter*, 6 Ves. 290; *Grierson* v. *Eyre*, 9 Ves. 341.

Where a lessee during his possession had allowed the boundaries between his own property and that which he held by demise to become confused, a bill for a commission filed by him after his lease had expired, against an assignee of the lessor, who had obtained possession of both properties, but not, it appeared, improperly, was dismissed by Sir *T. Plumer*, M. R., who said that the Court would not interfere between independent proprietors; but there must be shown some misconduct on the part of the defendant or those under whom he claims, which renders it incumbent on him to co-operate in re-establishing the boundaries. *Miller* v. *Warmington*, 1 Jac. & W. 472.

There must be some ground in equity against the *defendant* to warrant the Court's interference.

Where the defendant and his ancestors had from the time of Henry VIII., been lessees under Queen's College, Cambridge, of a field which in the leases had been uniformly described as containing by estimation sixty acres, and on the expiration of the last lease the defendant delivered up only forty acres, alleging that the customary estimated acre contained only three roods, and claiming certain adjoining property which had been fenced within the last sixty years as his own; the Court, being satisfied that some part of the college land had been retained by the de-

Godfrey v. *Littel.*

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conditions, therein mentioned: And whereas by an indenture dated the ——— day of ———, and made &c., All (*transcribe the freehold parcels so far as is material*), with the appurtenances, were conveyed unto and to the use of the said [*wife*], her heirs and assigns: And whereas the last-mentioned freehold hereditaments abut upon and adjoin the hereditaments so as aforesaid demised by the said indenture of demise, in a line extending in direction from ———, south-westwards, to ———, (*describe the boundary so far as it is ascertained*), but the exact limit and boundary between the hereditaments comprised in the above-recited indenture of the ——— day of ———, 18—, and the hereditaments comprised in the said indenture of demise, is not certainly known as to so much of the said limit and boundary as is between ——— and ——— (*state the extremities of the disputed boundary*), which uncertain or unknown part of the said limit or boundary is left uncoloured in the map or plan of the said hereditaments, drawn in the margin of these presents, the ascertained and known parts of such limit or boundary being in the same map or plan indicated by a blue line: And whereas it has been agreed between the parties hereto, that the settlement of such uncertain or unknown limit or boundary shall be referred to the adjudication of [*referee*], of &c., under or by virtue of an Act passed in the second and third years of the reign of King William the Fourth, intituled, "An Act to authorize the identifying of Lands and other Possessions of certain Ecclesiastical and Collegiate Corporations." NOW THIS INDENTURE WITNESSETH, that the parties

Of conveyance in fee to wife; that the estates are adjoining; that the boundaries are not known in some parts.

Reference to map.

Agreement to refer settlement of boundaries.

Testatum.

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fendant, directed a commission to settle the boundaries, or a compensation, although the defendant strongly contended for an issue. On that question the Court said, that the Court would be guided by the circumstances of the case: if the question is merely whether certain specified land belongs to A. or to B., an issue is fittest; but when the limits in dispute are not ascertained on both sides respectively, and a question of compensation may arise, a commission will be most proper: *Godfrey* v. *Littel*, 1 Russ. & M. 59; affirmed on appeal, 2 Russ. & M. 630. As to the form of the decree for a commission, see *Duke of Leeds* v. *Earl Strafford*, 4 Ves. 186: *Willis* v. *Parkinson*, 2 Mer. 507.

Discretion of the Court in granting an issue or a commission.

Evidence at law.

As to the evidence of boundaries in a trial at law, see *Bridgeman* v. *Jennings*, Lord Raym. 734; *Thomas* v. *Jenkins*, 1 Nev. & P. 587; *Taylor* v. *Devey*, 2 Id. 469; *Briscoe* v. *Lomax*, 3 Id. 308; *Evans* v. *Rees*, 2 Per. & D. 626.

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hereto (*c*) severally declare and agree, that the final settlement of the uncertain or unknown limit or boundary shall be, and is hereby referred to the adjudication of [*referee*]: AND that the said [*referee*] shall be and is hereby fully authorized to make such surveys, maps and admeasurements of the hereditaments hereinbefore mentioned or referred to, or of any of them, or of any part thereof respectively; And to summon such persons as witnesses, and examine them on oath, concerning the matter hereby referred, or in any way relating thereto; And to call for the production of all such surveys, maps, deeds, books, papers, and writings, in the custody or power of any of the parties hereto, or of any other person or persons, of or concerning the matter hereby referred, as the said [*referee*] shall think fit. AND FURTHER, that the said [*referee*] having well and sufficiently investigated and considered the same, and all matters hereby to him referred, shall and may make his award in writing, under his hand and seal, with a map drawn thereupon, or thereunto annexed: Which award and map shall be upon parchment or vellum, and shall award and determine, identify, delineate, and describe the boundaries, quantities, particulars, and situations of the said hereditaments so referred to him as aforesaid: And which award and map shall be laid before all the parties hereto, and upon the approbation of each of the parties hereto being written upon the same award and sealed with the seal of the said Dean and Chapter, and signed (*d*) and sealed by each of the other parties hereto, the same award and map shall be for ever afterwards binding upon each and all of the parties hereto, and their several and respective successors, heirs, executors, administrators, and assigns, and final and conclusive as to all matters therein or thereby respectively contained or referred to. AND IT IS LASTLY HEREBY AGREED

Parties agree that settlement of boundaries shall be referred to A. B.

Power to make surveys; to examine witnesses; to call for deeds, &c.

Award and map to be made.

Approbation of parties to make award and map binding and conclusive.

Costs to be borne equally.

(*c*) If the consent of any spiritual superior is requisite (see 2 & 3 Will. 4, c. 80, s. 2), add,

Consent.

"By and with the consent of ———, testified by his [their] executing these presents."

The approbation of the award in such case must also be executed by such consenting party: Ib.

(*d*) The Act requires the approbation to be *signed* and sealed by all parties, but, in the case of a Dean and Chapter, the affixing of the corporate seal is the only signature that can be made.

XXIII. Agreement to settle Disputed Boundaries of Church Lands.

that the expenses attending the preparation and execution of these presents, and the proceedings for carrying the reference hereby made into effect or relating thereto, shall be equally divided and paid and borne among and by the said parties hereto respectively, or their respective successors, executors, administrators, or assigns. In witness whereof the said Dean and Chapter have set their common seal, and the said other parties hereto have severally set their hands and seals the day and year first above written. Dated in the chapter-house of the said Dean and Chapter, the day and year first above written.

XXIV. *AGREEMENT for a* Partition *of* Freehold, Copyhold, *or* Leasehold *Premises; where the Part which each is to take in Severalty has been previously ascertained; and it is referred to* Commissioners, *or their Umpire, to determine the Sum to be paid for Equality of Partition* (*a*).

ARTICLES OF AGREEMENT made the ——— day of ———, 18—, Between [*first party*], of &c., of the one part; and [*second party*], of &c., of the other part. Parties.

Partitions, how effected.

(*a*) Partitions may be effected under the order of the Court on the application of any one or more of the joint tenants, even though the others may be unwilling or unable to consent. Compulsory partitions were formerly effected by writ of partition, but this mode of proceeding was abolished by the stat. 3 & 4 Will. 4, c. 27. The present practice is for the Court to issue a commission for the purpose. Under the Partition Act, 1868 (31 & 32 Vict. c. 40), s. 3, the Court has power to order a sale instead of a partition, and where the owners of a moiety or upwards of the property request a sale, is to direct a sale accordingly "unless it sees good reasons to the contrary" (sect. 4). See as to this, *Pemberton* v. *Barnes*, L. R., 6 Ch. 685; *Wilkinson* v. *Joberns*, L. R., 16 Eq. 14; *Porter* v. *Lopes*, 7 Ch. D. 358; see also *Rowe* v. *Gray*, 5 Ch. D. 263. The procedure of the Court in partition actions was modified by the Partition Act, 1876 (39 & 40 Vict. c. 17), which also allows actions for sale of joint property without the necessity of claiming a partition (sect. 7). See, as to the jurisdiction of the Court as regards partitions, *Swaine* v. *Denby*, 14 Ch. D. 326; *Taylor* v. *Grange* (C. A.), 15 Ch. D. 165; *Waite* v. *Bingley*, 21 Ch. D. 674; *Biggs* v. *Peacock* (C. A.), 22 Ch. D. 284; *Boyd* v. *Allen*, 24 Ch. D. 622; see also *Pitt* v. *Jones*, 5 App. Cas. 651. A power of exchange in a settlement authorizes a partition: *Re Frith and Osborne*, 3 Ch. D. 618.

XXIV. Partition.

WHEREAS (*b*) the said parties hereto are seised of or entitled to the fee-simple (*c*), as tenants in common [*or* in joint tenancy, *or* in coparcenary] (*d*), in possession of All those two closes or parcels of land, situate at ———, in the county of ———, in the occupation of ———; And also all that messuage or tenement and garden situate at ——— aforesaid, in the occupation of ———. AND WHEREAS the said [*first party*] and [*second party*] have mutually agreed to effectuate a partition of the said lands and hereditaments, upon the terms and in the manner hereinafter mentioned. NOW THESE PRESENTS WITNESS, and it is hereby agreed between the parties hereto, in manner following: that is to say (*e*):

Recital of seisin in possession.

Parcels.

Recital of agreement for partition.

Testatum.

(*b*) If the premises be leasehold, say, LEASEHOLD.

"WHEREAS by indenture, dated the ——— day of ———, 18—, and made between [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part; the said [*lessor*] demised unto the said [*lessee*] All those two messuages and gardens, situate at ———, in the county of ———, with the appurtenances, for the term of ——— years, from the ——— day of ———, 18—, at the yearly rent of £———, and subject to the several covenants and agreements therein contained. AND WHEREAS the said [*lessee*] died intestate in or about the year 18—, and administration of his personal estate and effects was granted to the said [*first party*] in the Principal Registry of Her Majesty's High Court of Justice, Probate Division, on the ——— day of ———, 18—. AND WHEREAS the said [*first party*], and the said [*second party*], are the only children and next of kin of the said [*lessee*]; and as such are possessed of, or entitled to, the said messuages and gardens, with the appurtenances, for the remainder of the said term."

Recital of lease.

Intestacy of lessee, and grant of administration.

Of parties being entitled as next of kin of lessee.

(*c*) If the premises be copyhold, say, COPYHOLD.

"according to the custom of the manor of ———, in the county of ———, in joint tenancy, &c."

(*d*) If the premises are subject to a lease, say, REVERSION.

"in remainder or reversion expectant upon the determination of a term of ——— years, from the ——— day of ———, 18—, [if [*nominees*] or either of them should so long live] created by an indenture of lease dated, the ——— day of ———, 18—, and expressed to be made between [*parties*]."

Subject to lease.

(*e*) "The messuage and garden, now in the occupation of LEASEHOLD.

XXIV. Partition.

Part of premises to belong to one party, and part to the other.

1. The said two closes or parcels of lands shall hereafter belong to, and become the sole property of the said [*first party*], his heirs and assigns; And that the said messuage or tenement, and garden, shall hereafter belong to, and become the sole property of the said [*second party*], his heirs and assigns.

Referees to determine equality of partition.

Umpire, in default of referees, to determine equality of partition.

2. It shall be referred to ———, of &c., a referee nominated by and on behalf of the said [*first party*], and ———, of &c., a referee nominated by and on behalf of the said [*second party*], to decide and determine (*f*) whether any, and what sum of money, shall be paid for equality of partition; and whether by a yearly payment, with a power of distress and entry, or by the payment of a sum in gross; and by which of the said parties, and at what time, such money shall be paid (*g*); And if the said referees should not agree in their determination, within the space of ——— calendar months from the date hereof, Then the same shall be referred to such one person as the said two referees shall,

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———, shall hereafter belong to, and become the sole property of the said [*first party*] for the remainder of the said term; And that the messuage and garden, now in the occupation of ———, shall hereafter belong to, and become the sole property of the said [*second party*] for the remainder of the said term."

Referees, or umpire to determine which party shall pay rent, or in what proportions; and whether cross powers of distress shall be inserted in assignments.

(*f*) "which of the said parties shall hereafter, during the said term, pay the yearly rent of £———, reserved and made payable by the said indenture of lease, or otherwise in what proportion they shall pay the same; and whether there shall be inserted in the conveyances and assignments hereinafter agreed to be made, cross covenants for payment of the apportioned rent, and cross powers of distress and entry on the non-payment of the same, by the said parties respectively, in order that the said parties respectively may be reimbursed all costs, charges, and expenses, which either of them shall incur by reason of the non-payment of the rent to be paid by the other of the said parties, and"

REVERSION.

(*g*) "and to which of the said parties, or in what proportion, the yearly rent, reserved by the said indenture of lease, shall be paid during the continuance of the term thereby granted;"

within the space of ——— calendar months from the date thereof, for that purpose appoint to be umpire, who shall decide and determine the same within ——— calendar months next after he shall be appointed umpire.

Parties to execute mutual conveyances.

3. When it shall have been determined whether any and what sum of money shall be paid for equality of partition, and in what manner, and by which of the said parties such money shall be paid (*h*), Then the said parties respectively shall (*i*) execute all such conveyances or assurances, as shall be necessary for effecting the partition hereby agreed to be made; and upon the execution of such conveyances, or assurances the money, if any, payable for equality of partition shall be paid; and the same shall until payment thereof be a charge upon the part or share of and in the said premises, the owners whereof shall be liable to make such payment.

Power to referees, or umpire, to make survey, &c.

4. The said referees, or their umpire, shall be, and they and he are hereby authorized, (if they or he should think fit), to make a survey of the lands and hereditaments, and cause a map or plan to be drawn thereof.

Each party to pay for his own conveyance.

5. The costs, charges, and expenses of the respective conveyances of the premises to be taken in severalty, shall be paid and borne by the party to whom the same shall be made; but the costs, charges, and expenses of preparing, engrossing, and executing this present agreement [and a duplicate hereof], or in anywise relating thereto, and of making such survey, and of such map as aforesaid and all

But other costs and charges to be borne equally.

(*h*) "and which of the said parties shall be entitled to the said yearly rent, or in what proportions,"

COPYHOLD.

(*i*) "with the license and consent of the lord or lords, lady or ladies, of the manor or manors, of which the same are holden, make, do, and execute, all such acts, deeds, conveyances, surrenders, or assurances, as the counsel of the said parties respectively, or their respective heirs or assigns, shall advise or require, for the purpose of conveying, surrendering, and assuring the said, &c."

It seems that a partition by agreement cannot be perfected without the license, or subsequent consent, of the lord: such as admitting them tenants to the respective parts in severalty: Hale's MS., Hargr. n. Co. Litt. 59 a, (1).

The power of the Court as regards partition is extended to lands of copyhold and customary tenure by the stat. 4 & 5 Vict. c. 35, sect. 85.

XXIV. Partition.

other costs, charges, and expenses of the said referees, or their umpire, and all other costs, charges, and expenses incurred, or to be incurred, in or about the partition hereby agreed to be made, or in anywise relating thereto, shall be paid and borne by the said parties hereto respectively, in equal proportions.

Referees, or umpire, to decide who shall have title-deeds, and who shall pay for attested copies, &c.

6. The said referees, or their umpire, shall decide to which of the said parties the custody of the several title-deeds relating to the said lands and hereditaments shall respectively belong: and by which of them, and in what proportions, the expenses of any attested copies or covenants for production of deeds, or acknowledgments of right to production thereof, and undertakings for safe custody thereof, which the said referees, or their umpire, may deem necessary, shall be borne.

As witness, &c.

XXV. *AGREEMENT for a* Partition *by* Commissioners, *of* Freehold *and* Copyhold *Premises, between two* Co-heiresses *and their* Husbands, *and the* Trustees *of a* Settlement *of the Share of one; and that certain parts of the Property shall be taken as part of each Allotment.*

Parties.

ARTICLES OF AGREEMENT made the ——— day of ———, Between A., of &c., and B., his wife, of the first part [*two trustees*], of &c., of the second part; D., of &c., and E., his wife, of the third part.

Recitals of intestacy, and seisin of father;

Whereas [*father*], of &c., died intestate on or about the ——— day of ———, in the year 18—, seised of, or sufficiently entitled to the fee-simple of the freehold and copyhold lands and hereditaments hereinafter described, and hereby agreed to be partitioned, and which thereupon descended to the said B. and E.

of descent to his daughters;

as his only children, and heirs-at-law: And whereas by an indenture dated the ——— day of ———, 18—, and expressed to be made between the said B. by her then name and description of [*maiden name*], of the first part, the said A. of the second part, and [*trustee*] of &c., of the third part,

of settlement of one moiety;

(being a settlement made on the marriage of the said A. and B., and which was afterwards duly solemnized), the moiety

or equal half part of the said B., of and in the said lands and hereditaments, was conveyed and covenanted to be surrendered to the said [*trustee*] and his heirs; As to the said freehold lands and hereditaments, to the use of, and as to the said copyhold (*a*) lands and hereditaments, in trust for such person or persons, and for such ends, intents, and purposes as the said A. and B. by deed jointly appoint: And in default of such joint appointment, to the use of and in trust for such person or persons as the said B., by will, whether sole or covert, should solely appoint; and in default of such appointment, or so far as the same should not extend, to the use of, and

to such uses as husband and wife should jointly appoint;

in default, as wife alone should by will appoint;

in default, to husband in fee, if the survivor;

(*a*) The Statute of Uses does not extend to *copyholds*, because the transmutation of possession by the sole operation of the statute, without the consent or allowance of the lord, or the agreement of the tenant, would tend to the prejudice both of the lord and of the tenant: Co. Cop. s. 54; Tr. 124; Wms. n. 2 Saund. 11. g: and this is plain from common experience; for, when a copyholder surrenders to the use of another the possession is not executed to the use, as the estate remains in the surrenderor, and surrenderee has nothing until admittance but an equitable estate: Gilb. Ten. 182; 1 Sand. Uses, 5th edit. 249; 1 Cru. Dig. 4th edit. 354, 397; Cru. Uses, 55; Sug. Gilb. Uses, 72: and therefore a surrender of copyhold lands to uses is not to be considered on the foot of a use or trust; for, as copyholds are not within the Statute of Uses, such surrender is only a direction to the lord whom to admit; and when admitted, the surrenderee is in by the grant of the lord, not of the surrenderor; so that it is of a particular nature, and not as a use or trust on the statute: per Lord *Hardwicke*, 2 Ves. 257; 1 Watk. Cop. 100, 185; 2 Ibid. 193; and therefore the construction of the surrender of copyholds must be the same as if the estates had been limited by feoffment, or any other deed deriving its effect purely from the principles of the common law, without the intervention of the Statute of Uses, and must be alike governed by the same rules of the common law: per *Holt*, C. J., 1 P. Wms. 77.

Copyholds are not within the statute.

As to future or springing uses of copyholds.

The case of *Boddington* v. *Abernethy*, 8 Dowl. & Ryl. 626; 5 B. & Cr. 776, established that a power of revocation and new appointment may be reserved of copyholds. See 1 Scriv. Cop. 226, 3rd ed.; Elton, Cop. 30, 68.

And a power of appointment over copyholds may co-exist with an interest in them. As, where copyholds were surrendered by R. to such uses as D. should by deed appoint, and in default of, and until such appointment, to the use of D. in fee; and D. appointed that the premises should remain to the use of P., it was held that the lord was compellable to admit P.; notwithstanding D. had never been admitted, and that neither he nor R. had ever surrendered to the use of P.: *Rex* v. *Lord of the Manor of Oundle*, 3 Nev. & M. 484; 1 Ad. & El. 283.

XXV. Partition.

in trust for the said A., his heirs and assigns, in case he should survive his said wife: And whereas by an indenture dated the ——— day of ———, 18—, and expressed to be made between the said E. by her then name and description of [*maiden name*], of the first part, the said D. of the second part, and the said [*trustees*] of the third part (being a settlement on the marriage of the said D. and E., and which was afterwards duly solemnized); the moiety or equal half part of the said E., of and in the said lands and hereditaments, was conveyed, and covenanted to be surrendered to the said [*trustees*] and their heirs, to certain uses, and upon certain trusts, therein particularly mentioned: In which lastly in part recited indenture of settlement are contained the usual powers to the said [*trustees*], with the consent in writing of the said D. and E., or the survivor of them, to make sale, partition, or exchange of the moiety of the said lands and hereditaments therein mentioned; with power to raise money to be paid, or to invest money received for equality of partition: And whereas the said A., and B. his wife, and the said [*trustees*], with the consent of the said D., and E. his wife, testified by their signing the agreement, have mutually agreed to make a partition of the lands and hereditaments mentioned in the schedule hereunder written. NOW THESE PRESENTS WITNESS, that for effectuating the said partition, the said A. and the said B., his wife, hereby respectively agree with the said [*trustees*], and they the said [*trustees*], as such trustees as aforesaid, with the consent of the said D., and E. his wife, testified as aforesaid, hereby agree with the said A., and B. his wife, in manner following, that is to say:

of settlement of the other moiety;

to certain uses and trusts;

with powers to trustees, with consent of husband and wife, or the survivor, to make sale, partition, or exchange;

of agreement to make partition.

Testatum.

Commissioners to make partition,

1. A partition or division of all and singular the said lands and other hereditaments, mentioned and comprised in the said schedule hereunder written [or hereunto annexed,] into two separate allotments, of equal value, or as nearly so as circumstances will permit, shall be made by [*commissioners*] of &c.

and decide who shall pay money for equality.

2. The said commissioners shall decide and determine, whether any, and what sum of money shall be paid for equality of partition, and by which of the parties such money shall be so paid.

Commissioners authorized to

3. For further enabling the said commissioners to make such allotments and division as aforesaid, it shall be lawful

for them, and they are hereby authorized, to make a survey of the said estate, and to cause a map or plan to be drawn thereof.

make a survey and map.

4. If the said commissioners should differ in opinion, touching the said intended partition, or the money to be paid for equality, or touching the mode of carrying the said partition into effect, or any matter or thing relating thereto, then and in every such case, the subject-matter of every such difference of opinion shall be reduced into writing, and shall be referred to the decision of an umpire, to be named by the said commissioners for that purpose; And the determination or decision of such umpire, upon the matter so to be referred to him, shall be final.

Umpire to decide the differences of commissioners.

5. When the allotments and division hereinbefore agreed upon shall have been made, the said parties shall draw lots, in such manner as the said commissioners shall appoint, for the privilege of choosing one of the allotments, into which the said estates shall have been divided.

Parties to draw lots for the privilege of choosing.

6. When it shall have been decided in manner aforesaid, which of the said allotments shall be taken in severalty by the said [*trustees*], as such trustees as aforesaid, and whether any and what sum shall be paid for equality of partition and by which of the said parties such money shall be paid: Then the said A., and B. his wife, and all other necessary parties, shall, at the expense of the said D., and E. his wife, execute all such conveyances, surrenders, or assurances, as by the said [*trustees*] shall be required, for the purpose of vesting such of the said allotments as shall have been decided to be taken in severalty by the said [*trustees*], with the appurtenances, in them the said [*trustees*], their heirs and assigns; Nevertheless, as to such part of the said lands and hereditaments as are of copyhold tenure, with the license and consent of the lord or lords, lady or ladies, of the manor or manors, of which the same are holden (*a*); and upon and for the uses, trusts, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements, in and by the said indenture of settlement of the ——— day of ———, 18—, expressed and declared of and concerning the said undivided moiety, hereditaments, and

When allotments, &c. ascertained, to execute conveyances to each other.

(*a*) *Vide ante*, p. 513.

XXV. Partition.

premises, comprised in and conveyed, and covenanted to be surrendered, by the same indenture as aforesaid.

7. The said D., and E. his wife, and all other necessary parties, shall, at the expense of the said A., and B. his wife, execute, or cause to be executed, all such conveyances, surrenders, and assurances, as by the said A., and B. his wife, or the survivor of them, shall be required, for the purpose of settling such of the said allotments as shall have been decided to be taken in severalty by the said A., and B. his wife, with the appurtenances, To the uses, upon the trusts, and for the purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements, in and by the above in part recited indenture of the ——— day of ———, 18—, expressed and declared of and concerning the hereditaments, and premises thereby limited and settled as aforesaid; nevertheless, as to such part of the said lands and hereditaments as are of copyhold tenure, with the license and consent of the lord or lords, lady or ladies, of the manor or manors of which the same are holden.

Expenses to be borne by parties equally.

8. The costs, charges, and expenses of preparing, engrossing, and executing this present agreement, and of making such partition and division as aforesaid, and of making such survey, and such map as aforesaid, and all other costs, charges, and expenses incurred, or to be incurred, in and about the said partition and division, or in anywise relating thereto, shall be paid and borne by the parties to the said partition in equal proportions (*b*).

Expenses of attested copies, &c. to be paid by the party requiring same.

9. If either of the parties to the said intended partition should require attested copies, of any of the title-deeds, in the custody of the other party to the said partition, or to have a deed of covenant for the production of any such title-deeds, then the expense of making such attested copies, and the expenses attending the making and executing of such deed of covenant, shall be paid by the party requiring the same.

Nomine pœnæ.

10. For the due execution and observance of the agreements hereinbefore contained, on the part of the said A., and B. his wife, the said A. doth hereby bind himself to the said [*trustees*], in the sum of £———: And for the due per-

(*b*) If the commissioners are to decide who shall have the title-deeds, *vide post*, p. 512.

formance and observance of the agreement hereinbefore contained on the part of the said [*trustees*], the said D. doth hereby bind himself to the said A., in the like sum of £———. XXV. Partition.

In witness, &c.

The Schedule above referred to.

XXVI. *AGREEMENT for an* Exchange *of* Freehold, Copyhold, *or* Leasehold *Premises; with reference to Commissioners, or their Umpire, to determine the Sum to be paid for Equality of Exchange.*

AN AGREEMENT made the ——— day of ———, 18—, Between [*first party*], of &c., of the one part; and [*second party*], of &c., of the other part; Whereby it is agreed as follows, that is to say:— Parties.

1. The said [*first party*], hereby agrees with the said [*second party*], that he the said [*first party*], will, on the ——— day of ——— next, at his own expense, make and deliver to the said [*second party*], or his solicitor, an abstract of the title of him the said [*first party*], to All that dwelling-house and garden, situate &c., with the appurtenances (*c*). And if such Agreement by first party to deliver abstract. Freehold. Parcels. To execute conveyance.

(*c*) If the premises are leasehold, say, Leasehold.

"held by the said [*first party*], for the remainder of a term of ——— years, granted by an indenture bearing date on or about the ——— day of ———, 18—, and made between [*lessor*], of the one part, and [*lessee*], of the other part, subject to the rents, covenants, and conditions, therein contained; And if such abstract shall show that the said [*first party*] has a good title to the said dwelling-house and garden, for the remainder of the said term, that he the said [*first party*], and all other necessary parties, on or before the ——— day of ——— next, on receiving from the said [*second party*] such sum of money, if any, as shall be awarded for equality of exchange, will, as beneficial owner, assign the said dwelling- Reference to lease.

XXVI. Exchange.

abstract shall show that the said [*first party*] has a good title to the inheritance in possession in fee-simple of the said dwelling-house and garden (*d*), that he the said [*first party*], and all other necessary parties, on or before the ——— day of ——— next, on receiving from the said [*second party*], such sum of money, if any, as shall be awarded for equality of exchange, will as beneficial owner (*e*), convey unto the said [*second party*], the said dwelling-house and garden, with the appurtenances, in fee-simple in possession, free from incumbrances, in consideration of such money, if any, for equality of exchange, and of a conveyance in fee simple in possession, free from incumbrances, of the two closes of land, with the appurtenances hereinafter mentioned.

2. THE SAID [*second party*] hereby agrees with the said [*first party*], that he, the said [*first party*] will, on or before the said ——— day of ——— next, at his own expense, make and deliver to the said [*first party*], or his solicitor, an abstract of the title of him the said [*second party*], to ALL THOSE two closes of land, situate, &c., with the appurtenances (*f*): AND if such abstract shall show that the said [*second*

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house and garden to the said [*second party*], for the residue of the said term, free from incumbrances, but subject as aforesaid, in consideration of such money, if any, for equality of exchange, and of a conveyance of the two closes of lease-

Covenant to be contained in assignment.

hold land, hereinafter mentioned; in which conveyance shall be contained a covenant by the said [*second party*] to pay the rents and perform the covenants and agreements reserved and contained in the same indenture of lease, and to indemnify the said [*first party*] therefrom."

COPYHOLD.

(*d*) If the premises are copyhold of inheritance, say,

"according to the custom of the manor of ———, in the county of ———, of which the same premises are holden."

To surrender.

(*e*) "duly surrender the same according to the custom of the said manor, to the use of the said [*second party*], his heirs or assigns, or as he or they shall direct, to be holden at the will of the lord, according to the custom of the said manor by rents and services therefor due and of right accustomed, but free from all incumbrances whatsoever."

(*f*) For variations, if the premises are leasehold, *vide supra*, p. 517, note.

party] has a good title to the inheritance in possession in fee-simple of the said two closes of land, that he, the said [*second party*], or his heirs, and all other necessary parties, on or before the ——— day of ——— next, on receiving from the said [*first party*] such sum of money, if any, as shall be awarded for equality of exchange (*g*), will as beneficial owner or owners execute a proper conveyance of the fee-simple and inheritance in possession of the said two closes of land, with the appurtenances, free from incumbrances, unto the said [*first party*], in consideration of such money, if any, for equality of exchange, and of a conveyance of the fee-simple and inheritance in possession, free from incumbrances, of and in the said dwelling-house and garden, with the appurtenances.

Commissioners or umpire to determine equality of exchange-money.

3. It shall, at the joint expense of both parties, be referred to [*commissioners*], of &c., and in case of their differing in opinion, then to an umpire, to be chosen by them, to decide and determine whether any and what sum of money shall be paid for equality of exchange, by either of the said parties unto the other of them (*h*).

No implied warranty.

4. It shall be expressly declared in the said conveyances to each of the said parties, that neither of them shall re-enter on the lands conveyed in exchange, in consequence of any defect of title (*i*): And each of the said parties shall, at the

To deliver title-deeds.

(*g*) For variations where the premises are copyhold of inheritance, *vide supra*, p. 518, notes (*b*) and (*c*). COPYHOLD.

(*h*) It may be prudent to add clause for appointing new commissioners, see *ante*, p. 499.

(*i*) If it be the agreement, instead of the above clause, say,

Eviction clause.

"And there shall be contained in the said conveyances to each of the said parties, the usual clause of re-entry on the lands given in exchange, on eviction from any part of the lands received in exchange."

Warranty on exchange.

As to these clauses, and the subject of exchanges in general, *vide post*, tit. Exchanges.

Covenant for production title-deeds given on exchange.

In consequence of the implied right of re-entry which is incident to exchange, it may sometimes be prudent, although it is not usual, for the exchangers to execute covenants for producing the title-deeds, mutually received, or for each to retain copies of those given; because, it seems, that when lands received in exchange, &c. are sold, the vendor ought to produce an abstract of the title and the deeds relating to the lands *given*, as well as those *received* in exchange (unless, in the case of an exchange at common law, the lands given in exchange can be proved to have

XXVI. Exchange.

time of executing the said conveyances, deliver to the other the several title-deeds in his custody or power relating to the lands conveyed in exchange (*k*).

Expenses of conveyances.

Fees of counsel, &c.

5. Each of the said parties shall pay the costs and charges for preparing and engrossing the (*l*) conveyance of the premises received by him in exchange; And the fees and charges of his own counsel and solicitor.

In witness, &c.

XXVII. *AGREEMENT for an* Exchange, *between a* Mayor and Corporation *and a private Individual, to be effected by the* Land Commissioners *for England and Wales* (*m*).

Parties.

AN AGREEMENT made the ——— day of ———, 18—, Between the mayor, aldermen, burgesses and commonalty of the borough of ———, of the one part; and A. B., of &c., of the other part, whereby it is agreed as follows; that is to say:

1. The piece or parcel of land, &c. [*describe parcels*], belonging to the said mayor, aldermen, burgesses and com-

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been aliened by the other party), as the purchaser might otherwise be evicted from the lands purchased, on account of a defect in the title to the lands given in exchange: *vide post*, tit. Exchanges.

(*k*) If the title-deeds relate to lands of greater value: *vide ante*, p. 405, substituting "exchanged" for "sold."

copyhold.

(*l*) If the premises are copyhold, say,

"surrender of and deed of covenants relating to the premises received by him in exchange."

Exchanges by Land Commissioners.

(*m*) The above Precedent is adapted from one contained in the 3rd edition of this work, vol. i., p. 634, which provided that the parties should apply for the King's licence, or for a private Act of Parliament, as was then necessary, when either of the parties were under any disability for the purpose of carrying the proposed arrangement into effect. Exchanges are now frequently effected by the Land Commissioners for England and Wales under the Inclosure Acts, 1845 to 1878. And partitions are sometimes, but less frequently, effected in the same manner.

Inclosure Acts, 1845 to 1878.

The Acts comprised under the above title are as follows, viz.:—8 & 9 Vict. c. 118; 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31; 22 & 23 Vict.

monalty, and more particularly described in the first schedule hereunder written, and delineated in the plan hereto annexed,

c. 43; 31 & 32 Vict. c. 89; 39 & 40 Vict. c. 56; and 41 & 42 Vict. c. 56.

In sects. 16—21 of the stat. 8 & 9 Vict. c. 118, the "persons interested for the purposes of applications under the Act" are described; the description includes persons in actual possession or enjoyment of lands, or receipt of the rents and profits thereof, without regard to the real amount of interest of such persons, and provisions are made to meet cases where the "persons interested" are the Crown, the Duchies of Lancaster and Cornwall, or are jointly interested or under disability. By the interpretation clause, sect. 167, it is provided that, "the word 'person' shall mean and include the Queen's Majesty, and any body corporate, aggregate or sole, as well as an individual." And sect. 147 of this Act enacts, "that it shall be lawful for the commissioners, upon the application in writing of the persons interested, according to the definition hereinbefore contained, in lands not subject to be inclosed under this Act, or in lands subject to be inclosed under this Act as to which no proceedings for an inclosure shall be pending, and who shall desire to effect an exchange of lands in which they respectively shall be so interested, to direct inquiries whether such proposed exchange would be beneficial to the owners of such respective lands: and in case the commissioners shall be of opinion that such exchange would be beneficial, and that the terms of the proposed exchange are just and reasonable, they shall, unless notice of dissent to the proposed exchange shall be given, under the provisions hereinafter contained, cause to be framed, and confirmed under the hands and seal of the commissioners, an order of exchange, with a map or plan thereunto annexed, in which order shall be specified and shown the lands given and taken in exchange by each person so interested respectively; and a copy of such order, under the seal of the commissioners, shall be delivered to each of the parties on whose application the exchange shall have been made; and such order of exchange shall be good, valid and effectual in the law to all intents and purposes whatsoever, and shall be in nowise liable to be impeached by reason of any infirmity of estate, or defect of title of the persons on whose application the same shall have been made; and the land taken upon every such exchange shall be, and enure to, for, and upon the same uses, trusts, intents and purposes, and subject to the same conditions, charges and incumbrances, as the lands given on such exchange would have stood limited, or been subject to, in case such order had not been made; and all expenses with reference to such order and exchange, or the inquiries in relation thereto, or to any proposed exchange, shall be borne by the persons on whose application such order shall have been made, or such inquiries undertaken: Provided always, that no exchange shall be made of any land held in right of any church or chapel, or other ecclesiastical benefice, without the consent, testified in writing, of the bishop of the diocese, and the patron of such benefice."

Exchanges may be made under sanction of commissioners of lands not subject to be inclosed, or as to which no inclosure is pending.

XXVII. **Exchange.**

and therein coloured red shall, as soon as conveniently may be, be exchanged for the piece or parcel of land [*describe parcels*]

Exchanges by ecclesiastical corporations.

By the Ecclesiastical Leasing Act, 1850 (21 & 22 Vict. c. 57), sect. 1, ecclesiastical corporations are also empowered to make sales and exchanges, in certain cases, with the approval of the ecclesiastical commissioners.

Stat. 10 & 11 Vict. c. 111.

By the stat. 10 & 11 Vict. c. 111, s. 4, exchanges may be made, excepting or reserving mines and minerals; and by sect. 6 of the same Act it is provided that lands taken in exchange in respect of copyhold or customary lands shall be held to be copyhold (or customary), and shall be held of the same lord, &c.; but "by and with the consent of the lord of the manor, and of the parties so taking such lands in exchange . . . . it shall and may be lawful for the said commissioners to declare that the same shall be held as of freehold tenure on such terms and conditions as may be agreed upon between the parties, and as may be deemed just by the said commissioners, and the same land shall be held as freehold accordingly."

Stat. 12 & 13 Vict. c. 83.

By sect. 7 of the stat. 12 & 13 Vict. c. 83, it is enacted, "That all the provisions of the said recited Acts (*i. e., the previous Inclosure Acts*) applicable to the powers of exchange and partition under the said recited Acts, shall extend and be applicable to the "exchange of all rights of common, rights of fishing, manorial and other rights, and all easements over any land, and all quit rents, chief rents, heriots, tithes, and rent-charges for any other of the said rights, easements and things, whether of the same or of a like or different nature, or for land, and also to the partition of the same respectively; and when two or more persons shall be interested jointly, severally, as a class or in common, in any rights or property proposed to be exchanged or partitioned under this or the said recited Acts, the application of two-thirds in value of the persons so interested jointly, severally, as a class, or in common as aforesaid, shall be deemed the application of all persons interested, or having any estate therein." And by sect. 11 of the same Act, it is provided that lands held under separate titles by the same person may be exchanged.

Stat. 15 & 16 Vict. c. 79.

By the stat. 15 & 16 Vict. c. 79, s. 32, power to effect partitions and exchanges is given "where any person or persons, interested in any undivided parts or shares of any land or other subject-matter of partition, within the meaning and intent of the said recited Acts, or any of them, and also interested in the entirety of any land or other subject-matter of exchange within the meaning and intent of the said recited Acts or any of them, shall be desirous at one and the same time of effecting a partition and exchange thereof."

Stat. 17 & 18 Vict. c. 97.

By the stat. 17 & 18 Vict. c. 97, "Undivided shares in any land or other subject-matter of exchange, may be exchanged under the provisions of the said Acts, upon the application of the person interested under the provisions of the said Acts, in respect of such undivided shares" (sect. 2): and "the word 'land' shall extend to and include incorporeal as well as corporeal

belonging to the said A. B., and more particularly described in the second schedule hereunder written, and delineated in the said plan and therein coloured green. XXVII. Exchange.

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hereditaments, and any undivided share thereof" (sect. 3). And by sects. 10 and 11 of the same Act, the commissioners are empowered to apportion fee farm rents and other fixed annual or periodical payments charged upon lands, and by the order of apportionment may, where necessary, determine boundaries of lands charged with such payments.

Stat. 20 & 21 Vict. c. 31.

The stat. 20 & 21 Vict. c. 31, contains provisions with regard to exchanges of land by railway and other companies (sect. 4), and as to exchanges of lands in which her Majesty is interested in reversion (sect. 5). And the same Act provides that on an exchange, inequality of value may be compensated by a rent-charge (sect. 6); and that on a partition disproportion in value of allotments in severalty may be similarly compensated (sect. 7); provided that the deficiency in value is not to exceed one-eighth of the actual value (sect. 8).

Limited owners.

Tenants for life and other limited owners in possession may, under the Inclosure Acts, initiate exchanges, &c., which, when completed, will bind the remaindermen: *Minet* v. *Leman*, 20 Beav. 269; 24 L. J., Ch. 545; and now by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 3, a tenant for life, or other limited owner, "(iii) may make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and (iv) where the settlement comprises an undivided share in land, or under the settlement, the settled land has come to be held in undivided shares, may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition." By sect. 4 of that Act "(2) every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained," and may be made subject to any stipulations respecting title, and to any restrictions or reservations with respect to buildings, mines and minerals, &c. The Act contains provisions for enabling the settled lands to be dealt with where the limited owners are infants, lunatics, &c. See sects. 59—62.

Stat. 45 & 46 Vict. c. 38.

Gavelkind lands.

Under the Inclosure Acts gavelkind lands may be exchanged for common socage lands, but the lands exchanged respectively retain their original tenure: *Minet* v. *Leman, ubi supra.* The commissioners have no power, in exchanging customary freeholds, to transfer the heriots and services: *Mayor and Corporation of Basingstoke* v. *Lord Bolton*, 3 Drew. 50.

Applications to land commissioners.

Where persons having agreed to exchange lands are desirous that the exchange should be effected by the land commissioners, limited forms of application with instructions for effecting exchanges under the provisions of the Inclosure Acts may be obtained from the office of the commissioners, No. 3, St. James' Square, London. The name and residence of the valuer proposed to be employed must be submitted to the commissioners for approval, before the valuation is undertaken. The valuer

XXVII. Exchange.

2. The said A. B., and the said mayor, aldermen, and burgesses, and all other necessary parties (if any), shall forthwith concur in an application to the Land Commissioners for England and Wales for an order of exchange under the hands and seals of the said Commissioners, in pursuance of the "Inclosure Acts, 1845 to 1878," ratifying this agreement and carrying the same into effect.

Appointment of valuer.

3. The said properties hereby agreed to be exchanged shall be surveyed and valued by C. D., of &c., on behalf of all parties to this agreement, subject to his nomination as such valuer being approved of by the said Commissioners; and if the said nomination shall not be so approved of, or if from any other reason the said C. D. shall not be able to act as such valuer as aforesaid, then the said properties shall be surveyed and valued respectively by such other competent and trustworthy valuer, as shall be agreed upon by the said parties to this agreement, and approved of by the said Commissioners.

Agreement respecting expenses.

4. The said A. B., his heirs, executors, administrators, or assigns, shall pay all costs, charges, and expenses, of and incident to the preparing and execution of these presents, and the making of the said valuation, the obtaining such order of exchange from the said Commissioners as aforesaid. In witness whereof the said mayor, aldermen, burgesses, and com-

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selected must be admittedly competent and trustworthy, and not the agent of, or connected with, either of the parties exchanging. In exchanges of glebe for other lands the bishop's consent should be obtained before the selection of the valuer. The valuation must be stamped as an appraisement. See stat. 31 & 32 Vict. c. 89, s. 2.

Mode of procedure.

The application and valuation having been received and considered by the Commissioners, notice is given by advertisement in three successive weeks of the proposed exchange, and after the expiration of three calendar months from the publication of the last of such advertisements, without any notice of dissent having been given to the Commissioners, an order of exchange is made, vesting the exchanged lands in the respective parties. By the order the title (though not the tenure) is effectually shifted, so as to render unnecessary the insertion, in an agreement for an exchange to be effected by the Commissioners, of any stipulations with regard to delivery of, or requisitions on title. The only material point in this respect is to satisfy the Commissioners that the applicants are "persons interested" within the meaning of the Inclosure Acts. The procedure of the Commissioners with regard to partitions is similar to that with regard to exchanges.

monalty have hereunto set their seal, and the said A. B. hath hereunto set his hand and seal, the day and year first above written (*n*). XXVII. Exchange.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

XXVIII. *AGREEMENT for the* ADOPTION (*o*) *of a Child.*

THIS INDENTURE made the ——— day of ———, 18—, BETWEEN A. B., of ———, in the colony of Victoria, Parties.

(*n*) No witness is required to the execution by the corporation: *Moises* v. *Thornton*, 8 T. R. 303.

(*o*) The law of England, strictly speaking, knows nothing of adoption, and does not recognise any rights, claims, or duties arising out of such a relation except as arising out of an express or implied contract. "The law makes the father the guardian of his children by nature and nurture:" per Lord *Eldon* in *Wellesley* v. *Duke of Beaufort*, 2 Russ. at p. 21; and his right, except so far as limited by statute, is absolute against all persons whatever, including the mother of the children: *Ex parte Skinner*, 9 J. B. Moore, 278; *Ex parte Glover*, 4 Dowl. 291; *R.* v. *Manneville*, 5 East, 221; *Ex parte Young*, 26 L. T. 92. This is the rule of law, whether the father retains the children under his own care, or commits their custody to others: *Ex parte McClellan*, 1 Dowl. 81. The father is the legal guardian of his children.

By the stat. 36 Vict. c. 12, it is enacted (sect. 1) that, "From and after the passing of the Act it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the Court shall deem proper, or to order that such infant or infants shall be delivered to the mother, and remain in her custody or under her control, or shall, if already in her custody, or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the Court shall direct; and further, to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the said Court shall deem proper." And by sect. 2 of the same Act, "No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its Court may order that mother may have access to and custody of infant under sixteen years. Royal assent, 24th April, 1873. In case of separation deed between father and mother.

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Australia, of the one part, and C. D., of &c., and E. D., his wife, of the other part. WHEREAS in the year 18—, the

Recitals (*p*).

providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto." As to this section, see further, tit. SEPARATION. The 3rd section of this Act repeals the Infants' Custody Act (2 & 3 Vict. c. 54), commonly known as Talfourd's Act, whereby similar discretionary powers were given to the Court on the application of the mother, when the child was under *seven* years of age.

Parental authority may be delegated.

The father may delegate his parental authority to a third person, who will then stand *in loco parentis* to the child, so far as is necessary for the purposes for which the child is entrusted to his care: see Bl. Com. Bk. I. ch. 16, vol. i., p. 441.

Grounds on which the Court will interfere with parental rights.

The authorities which show on what grounds the Court will interfere are collected in Simpson on Infants, chap. viii., pp. 136 *et seq.* The question will here be shortly discussed so as to illustrate and explain the above Precedent.

The High Court of Justice, inheriting the jurisdiction of the old Court of Chancery, will, on sufficient grounds, interfere with the father's rights with regard to the care and custody of his children, for their benefit. This jurisdiction is not confined to the Chancery Division, but in the exercise of such jurisdiction the rules of equity are to prevail: *Re Goldsworthy*, 2 Q. B. D. 75; see also stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 10.

The principal grounds on which the Court will interfere are as follows:—

(i) Misconduct.

(i) Unfitness in character and conduct, *e. g.*, gross cruelty, or habitual profligacy: *Ex parte Warner*, 4 B. C. C. 101; *Whitfield* v. *Hales*, 12 Ves. 492; *Warde* v. *Warde*, 2 Ph. 786; *Wellesley* v. *Wellesley*, 2 Bl. N. S. 124; *Re Cormicks*, 2 Ir. Eq. R. 264; *Swift* v. *Swift*, 11 Jur., N. S. 148, 458; *Re Goldsworthy*, 2 Q. B. D. 75. See also the celebrated case of *Shelley* v. *Westbrooke*, Jac. 266, n., where Mr. Shelley proposed to bring up his children as atheists: and compare the case of *Re Besant*, 11 Ch. D. 508, where the Court of Appeal held that where a child

Recitals.

(*p*) It will be seen from the remarks in note (*o*) that the enforcement of a contract for the adoption of a child against the father must always be a matter of some doubt, and must depend upon the circumstances of the particular case; and that the preparation of such contracts will require great care on the part of the draftsman.

Particular attention should be paid to the recitals, which should be so framed as to present, in their clearest light, so far as the father can be induced to admit them, all circumstances which tend to show that it is for the manifest benefit of the children that they should remain in the charge of the adoptor, and that the father should not be permitted to reclaim them at a future time.

said A. B., being then in embarrassed circumstances, departed from England, intending to reside in Australia, and left his

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was, by agreement in a separation deed, committed to the mother's custody, her refusal to give or allow to it religious instruction, and the publication by her of an immoral work, were in themselves sufficient grounds for removing the child from her custody. But in that case the Court did not decide whether or not the same grounds would be sufficient to deprive a father of the custody of his child: per *James*, L. J., at p. 518. Mere harshness of temper is not sufficient; *Blake* v. *Lord Wallscourt*, 7 L. T. 545; nor past irregularity of life; *Re Halliday*, 17 Jur. 56; nor even present immorality, if not such as would corrupt the morals of the children; *Re Spence*, 2 Ph. 247; *Ball* v. *Ball*, 2 Sim. 35; and see *March* v. *March*, L. R., 1 P. & M. 437. But the Court will exercise a larger discretion where the application for custody of children is by the mother: in such cases the Court will take great care that the father does not insist on his parental rights as a means of compelling the mother to forego her remedies against him for marital misconduct; *Warde* v. *Warde*, 2 Ph. 786; and will also pay great regard to the interests of the children: *Re Halliday*, 17 Jur. 56. See also *Re Taylor*, 4 Ch. D. 157.

(ii) Want of means for the support of the children. Mere poverty does not constitute unfitness; *Curtis* v. *Curtis*, 5 Jur., N. S. 1147; there must be actual insolvency, coupled with desertion, *Re England*, 1 Russ. & M. 499; or with immoral conduct, *Ex parte Warner*, 4 B. C. C. 101; *Ex parte Mountford*, 15 Ves. 445; or some other concurrent ground for the Court's interference. (ii) Insolvency.

(iii) Waiver by the father of his rights over the children. "Even a father himself may lose the right to the custody of his child, by allowing it to be brought up by other persons, if it becomes the manifest interest of the child not to be removed from the custody in which it has been placed:" per *Mellish*, L. J., in *Andrews* v. *Salt*, L. R., 8 Ch. at p. 640. And in the leading case of *Lyons* v. *Blenkin*, Jac. at p. 255, Lord *Eldon*, C., said: "Here is a fund provided for the maintenance and education of these children, and I think I am properly warranted by the authorities in asserting that if a testator thinks fit to provide a fund for the maintenance and education of children during their minorities, and at the end of that period makes a further provision for them, and the father permits their maintenance to be supplied from that source, allowing them to be brought up with expectations founded upon a particular species of maintenance and education which he himself cannot afford to give them, he is not (unless I greatly mistake the matter), according to the principles of this Court, at liberty to say, I will alter the course of education of my children by applying more scanty means to the purpose, and I will not permit them to have the benefit of that sort of maintenance and education which they have hitherto had; and in consequence of which their views in life are very different from what they would have been without it." In order to induce the Court to interfere, there must be not merely expectations, but some immediate irrevocable provision for the (iii) Waiver.

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two daughters, F. B. and G. B., now aged seven and five years or thereabouts, respectively, in the care of the said C. D. and E. D., and the said children have ever since that time continued to reside with, and have been maintained and educated by the said C. D. and E. D.: And whereas the said A. B. has no present intention of returning to England, and cannot now afford to give to his said children such

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child: *Anon.*, Jac. 264; *S. C.*, cited sub nom., *Jackson* v. *Hankey*, in Chambers on Infants, p. 27.

In *Warde* v. *Warde*, 2 Phil. 786, children were taken from the custody of their father, who had been guilty of gross misconduct, although there was merely an undertaking on the part of their uncle for the maintenance of the children. See also *Creuze* v. *Hunter*, 2 B. C. C. 500; *S. C.*, 2 Cox, 242; Jac. 250, n.

But in the case of *Re Fynn*, 2 De G. & S. at p. 480, *Knight Bruce*, V.-C., expressed a doubt whether under such circumstances an undertaking ought to be sufficient, and stated his impression that some actual appropriation of property or income, or some security, should be required.

(iv) Agreement.

(iv) Agreement that other persons shall have charge of the children. The question of agreement between husbands and wives as to the custody of their children will be considered in a subsequent volume, sub tit. Separation.

Where a third person by permission and acquiescence of, or by agreement with the father, obtains the custody of children, and the arrangement is acted upon, so that the revocation of the permission or agreement would be detrimental to the children, the father will be restrained from exercising his parental rights: *Lyons* v. *Blenkin*, Jac. 245; *Colston* v. *Morris*, Ibid. 257; *S. C.*, 6 Mad. 89; *Powell* v. *Cleaver*, 2 B. C. C. 500; *Andrews* v. *Salt*, L. R., 8 Ch. 622. But before the agreement is acted on, the father may rescind it. See *Hill* v. *Gomme*, 1 Beav. 541.

(v) Residence abroad.

(v) Where the father is resident or intends to reside out of the jurisdiction. The mere fact of such residence is sufficient to enable the Court to interfere; *Wellesley* v. *Duke of Beaufort*, 2 Russ. at p. 18; and although a father residing abroad has the right to nominate a person to take charge of his children in this country, the Court will disregard the nomination if it was apparently made under a misapprehension, and is injurious to the children: *Re Suttor*, 2 Fost. & F. 267. A ward of Court cannot be removed out of the jurisdiction without leave of the Court; *Mountstuart* v. *Mountstuart*, 6 Ves. 363; and an injunction will be granted to restrain the father from such removal. See *De Manneville* v. *De Manneville*, 10 Ves. 56; *Re Fynn*, 2 De G. & S. 457. As to circumstances under which leave will be given, see *Re Thomas*, 22 L. J., Ch. 1075; *Re England*, 1 Russ. & M. 499; *Clogstoun* v. *Walcot*, 9 Jur. 649. The Court will not, in the case of infants, the subjects of a foreign state, and resident in this country, interfere with the discretion of guardians properly appointed by the Courts of that state in removing the infants out of this country: *Nugent* v. *Vetzera*, L. R., 2 Eq. 704.

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maintenance and education befitting their station in life, as they have hitherto enjoyed: AND WHEREAS the said C. D. and E. D. are willing to adopt the said children, in manner hereinafter appearing, and subject to the conditions hereinafter contained, and on the part of the said A. B. to be observed. NOW THIS INDENTURE WITNESSETH that it is hereby agreed and declared, and the said A. B., so far as relates to the acts and stipulations on his part to be observed and performed, hereby covenants with the said C. D. and E. D., and each of them, the said C. D. and E. D., so far as relates to the acts and stipulations on his and her part to be performed and observed, covenants with the said C. B. as follows, that is to say:

Agreements and covenants for adoption, maintenance, &c.

1. The said C. D. and E. D. shall adopt the said F. B. and G. B., and shall, until the said F. B. and G. B. shall respectively attain the age of twenty-one years or marry under that age, maintain, board, lodge, clothe, and educate them in a manner suitable to their station, and as if they were the lawful children of the said C. D. and E. D., and shall at the cost of the said C. D. and E. D., and of the survivor of them, provide the said children with all necessaries, and discharge all the debts and liabilities, if any, which the said F. B. and G. B. or either of them may incur for necessaries or otherwise, and indemnify A. B. against all actions, claims and demands in respect thereof.

Appointment of guardians (*c*).

2. The said A. B. hereby nominates and appoints the said C. D. and E. D., during their lives, and after their respective

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Appointment of adoptor as guardian.

(*c*) By the stat. 12 Car. 2, c. 24, sect. 8, a father, even though a minor, was empowered to appoint a guardian of his children by deed or will; by the Wills Act (1 Vict. c. 26), sect. 7, the power of appointing a guardian by will is taken away from infant fathers, but the power of appointment by deed is left untouched. The father alone can appoint under the statute; a mother has no legal power to appoint guardians: *Re Kaye*, L. R., 1 Ch. at p. 390. See also as to illegitimate children, *Ord* v. *Blackett*, 9 Mod. 116. A deed appointing a guardian is, in some respects, of the nature of a will in having no operation during the father's life, and in being revocable at pleasure. See Macph. Inf. 83. But although a person appointed by deed has, strictly speaking, no authority as guardian until the father's death, yet the father by consent and acquiescence may enable the guardian to act, so as, with the other circumstances of the case, to induce the Court to restrain the father from removing the children from the care of the person so appointed. See *Lyons* v. *Blenkin*, Jac. at p. 263. An appointment of a guardian by deed is revoked by a subsequent appointment by will; *Earl of Shaftesbury* v. *Hannam*, Finch, 323; but a covenant not to

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deaths, the person or persons to be nominated in that behalf as is hereinafter mentioned, to be the guardians of the persons and estates of the said F. B. and G. B. until they shall attain the age of twenty-one years, or until they shall marry under that age, respectively.

Covenant not to revoke appointment.

3. The said C. B. shall not nor will revoke the appointment hereby expressed to be made, and will not by deed, will, or otherwise (except as herein is otherwise provided) appoint or apply for the appointment of any other person or persons except the said C. D. and E. D. to be guardian or guardians of the said F. B. and G. B. or either of them or their respective estates.

Surviving guardian may nominate successor.

4. In case of the death of either of them, the said C. D. and E. D., before the said F. B. and G. B. shall attain twenty-one years of age, or marry under that age respectively, or before the sooner determination of this agreement as is hereinafter provided, it shall be lawful for the survivor of them, the said C. D. and E. D., by deed or will to nominate and appoint any person or persons, as from and after the decease of such survivor, to be guardian or guardians of the said F. B. and G. B., or either of them. And in that event the said A. B. shall and will execute and do all such assurances, acts and things as shall be reasonably required by the survivor of them, the said C. D. and E. D., or of the person or persons so nominated by him or her as aforesaid, for the purpose of confirming such nomination and more effectually appointing the persons or person so nominated to be the guar-

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revoke has been upheld, even though the guardian was a creditor of the father: *Lecone* v. *Sheires*, 1 Vern. 442.

The appointment of a guardian may be either in possession or remainder. Where several guardians are appointed, the guardianship does not determine on the death of one, but devolves on the survivors; *Eyre* v. *Earl of Shaftesbury*, 2 P. Wms. 103; it is not assignable; *Bedall* v. *Constable*, Vaugh. 177; *Villareal* v. *Melish*, 2 Sw. 533; *Eyre* v. *Earl of Shaftesbury*, *supra*; but the father may authorize the surviving guardian to nominate a person in the place of one who has died: *Re Parnell*, L. R., 2 P. & M. 379. The appointment may be until the child attains twenty-one years of age or for a less period; if no time is mentioned, the guardianship will continue during the minority in the case of male children, but in the case of females it does not appear to be clearly settled whether it will determine on marriage under twenty-one years. See *Mendes* v. *Mendes*, 1 Ves. sen., at p. 91; *Roach* v. *Gowan*, ibid., at p. 159.

The subject of guardianship will be fully considered later, tit. Appointment.

dian or guardians of the persons and effects of the said F. B. and G. B. respectively.

Father not to interfere in education of the children (*d*).

5. The said C. D. and E. D., and the survivor of them, and after the death of such survivor, the person or persons to be nominated by him or her as aforesaid, performing and observing the stipulations herein contained, shall retain and have the custody, care and guardianship of the said F. B. and G. B. until they shall attain the age of twenty-one years, or marry under that age respectively, to the exclusion of the said A. B. and of any testamentary or other guardian appointed by him, and of all other persons claiming under him. And the said A. B. shall not himself, nor shall any other such guardian as aforesaid, or any person or persons claiming under him, or acting under, by, or with his authority, consent or privity, at any time or in any manner interfere with the training or management of the said children or either of them, or with their or her moral, intellectual or religious education or instruction, but the said A. B. and all other such guardians and persons as aforesaid shall permit and suffer

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Whether a contract by a father not to interfere in religious, &c. education of children is binding.

(*d*) It must be borne in mind that a stipulation of this kind is of doubtful efficacy. The question has frequently come before the Courts in cases of agreements made before marriage between husbands and wives of different religious persuasions, that the children shall be brought up in a particular religion. In *Andrews* v. *Salt, Mellish,* L. J., in delivering the judgment of the Court, said (L. R., 8 Ch. at p. 636): "We are of opinion that such an agreement is not binding as a legal contract. No damages can be recovered for a breach of it in a court of law, and it cannot be enforced by a suit for specific performance in equity. We think that a father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own." The Court has repeatedly refused to compel a father to fulfil such a promise. See *Re Meades,* Ir. L. R., 5 Eq. 98; *Re Agar-Ellis* (C. A.), 10 Ch. D. 49. And after the father's death the bringing up of the children in his religion has been enforced; *Davis* v. *Davis,* 10 W. R. 245; *Re Newbery,* L. R., 1 Ch. 263; *Hawksworth* v. *Hawksworth,* L. R., 6 Ch. 539; unless the father has by his conduct abandoned his right to have the children brought up in his own faith, or indicated a wish to the contrary: *Andrews* v. *Salt, supra; Re Clarke,* 21 Ch. D. 817. But where, after the father's death, the mother had changed her faith, and the child had, under her charge, been for several years brought up in, and acquired the distinctive doctrines of the mother's faith, the Lords Justices refused to remove the child from the mother's custody, or to interfere with the course of religious instruction: *Stourton* v. *Stourton,* 8 De G., M. & G. 760.

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the said C. D. and E. D. and the survivor of them, and, after the death of such survivor, the person or persons to be nominated as aforesaid, to bring up the said F. B. and G. B. until they should attain the age of twenty-one years, or marry under that age, at such places of residence, under the care of such persons, and in such form of religion, and generally in such manner as they, he or she shall think proper.

On breach by the father of the stipulations, the agreement to be voidable by adoptors.

6. If the said A. B., or any guardian appointed by him, or any person or persons claiming under him or acting under, by or with his authority, consent or privity, shall at any time reclaim or demand the custody of the said F. B. and G. B., or either of them, or shall interfere with their or her training, management, education or instruction, or if the said A. B. shall not perform and observe all and every of the stipulations herein contained and on his part to be performed and observed, then and in any such case it shall be lawful for the said C. D. and E. D., and the survivor of them, and after the decease of such survivor by notice in writing under their, his, or her hands or hand, and addressed either to the said A. B. or to the guardian or other person setting up such claim or demand, or so interfering as aforesaid, to put an end to the agreement hereby expressed to be made, and thereupon the same shall absolutely cease and determine: PROVIDED ALWAYS that in such event the said A. B. or his estate shall be liable to pay and satisfy all debts and liabilities incurred by or in anywise for the benefit of the said F. B. and G. B., or either of them, which at the time of such cesser of this agreement shall not have been paid and satisfied.

IN WITNESS, &c.

XXIX. *AGREEMENT for the* AMALGAMATION *of two limited* COMPANIES, *and transfer of Business.*

Parties.

ARTICLES OF AGREEMENT made the ——— day of ———, 18—, BETWEEN the A. Company, Limited (hereinafter called the old company), of the one part, and the B. Company, Limited (hereinafter called the new company), of the other part. WHEREBY the old and new companies respectively, for themselves and their respective successors and

Covenant and agreement.

XXIX. Amalgamation of Companies.

assigns, hereby mutually covenant and agree as follows, that is to say:—

Amalgamation.

1. That the old and new companies respectively shall (subject to clause 9 of this agreement), amalgamate with each other, and to this end the old company shall in manner and upon the terms hereinafter mentioned, sell to, and the new company shall purchase and take to, all and singular the real and personal estate and effects (including capital, funds, and assets), whatsoever or wheresoever situate, of the old company, and also the goodwill and all benefits and advantages whatsoever of the old company of, in, or connected with, or incidental to the business heretofore carried on by the old company at ———.

Consideration.

2. The consideration to be paid by the new company to the old company for such purchase shall be the sum of £———, represented by and to be taken in ——— shares in the new company of 2*l.* each, upon each of which said last-mentioned shares the sum of 1*l.* shall be considered and treated as paid-up, and which said new shares respectively are to be allotted in such manner, and to such persons as the old company may from time to time direct, or the certificates of such new shares respectively handed over and delivered in manner hereinafter mentioned.

Old company to be indemnified against liabilities.

3. In addition to the said purchase-money of £———, represented by ——— shares as respectively aforesaid, the new company shall as from the ——— day of ———, 18—, take upon themselves and bear, pay, and discharge, and well and effectually indemnify the old company and all shareholders therein from, and against all debts, claims, and liabilities whatsoever, and of what nature or kind soever (other than such shareholders in respect only of the sums paid upon or represented by the shares they respectively hold), now subsisting, or existing against the old company, and from and against all claims and demands in respect thereof respectively, and the new company shall also take upon themselves, and well and effectually indemnify the old company, and the shareholders therein, from or against the obligation of paying or discharging the sums of money (if any) which shall or may become hereby payable to shareholders in the old company under the winding-up hereinafter mentioned, to the extent nevertheless, only of the assets of the old company, which may come to the hands of the new company, or of which they may obtain the benefit or advantage.

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4. The old company shall forthwith take all necessary steps to wind up and dissolve the old company pursuant to the provisions in that behalf contained in the Companies Acts, 1862 and 1867, and to obtain the extinguishment and cancellation of all shares in the old company, and the appointment of liquidators whereby and by whom this agreement may be in all respects duly and properly carried out and effectuated.

Old company to be wound up.

Shares in old company to be exchanged for shares in new company.

5. The said several shares in the new company to be obtained from them as aforesaid shall be dealt with by exchanging them for shares in the old company in the proportions following, that is to say: every shareholder in the old company for and in respect of and in exchange for every share he holds therein of 10*l.* and upwards, upon which 2*l.* has been paid, shall have and take in the new company a 2*l.* share, whereon 1*l.* shall be treated as paid, and every shareholder in the old company for and in respect of every two shares he holds therein of 5*l.*, upon which 1*l.* has been paid, shall have and take in the new company a 2*l.* share, wherein 1*l.* shall be treated as paid, and all such shareholders respectively in the old company shall make, do, and execute all such necessary acts and deeds as may be required, as well for transferring, relinquishing, and giving up all shares held by them respectively in the old company, as for taking to and constituting himself a shareholder in the new company in respect of the shares therein which he is to take in exchange, as respectively aforesaid.

Power of liquidators.

6. In the event of the old company succeeding in passing the necessary special resolutions for and in all respects winding-up and dissolving the old company, as aforesaid, the carrying out of the stipulations and contracts on the part of the old company herein contained shall devolve upon, and in all respects be exercised by the liquidators to be appointed pursuant to such resolutions, who shall have full discretionary powers as to the manner and mode of, and the time in which they realize the assets of the old company, and such liquidators shall be entitled to receive from the new company, immediately upon the due passing and confirmation of such special resolutions, and without waiting for any realization of the assets of the old company, the said purchase-money or certificates for shares in the new company respectively allotted to such persons as they may direct, as respectively aforesaid,

for distribution between and among and delivery to the shareholders in the old company in exchange for their shares therein as respectively aforesaid, and such liquidators shall thereupon, save and except as to creditors of, and claimaints upon, or against the old company (if any), realize and deal with the assets of the old company in all respects as the new company may direct.

Necessary steps to be taken to carry out agreement.

7. All acts, deeds, and assurances whatsoever which may be required either by the old or new companies respectively, in order to the more effectual carrying out the provisions of these presents, shall, upon the said special resolutions being duly passed as aforesaid, be made, done, and executed by each of the said companies, at the expense nevertheless in all things of the new company.

Expenses to be borne by new company.

8. If the said special resolution shall be duly passed, and if this agreement shall be carried out, all fees, costs, charges, and expenses whatsoever of liquidators, solicitors, and others, of and incidental to the carrying out of the provisions of this agreement, and of and incidental to the said winding up, shall be borne by the new company.

Cesser of agreement.

9. These presents and every clause, matter, and thing herein contained are expressly provisional only, and entirely conditional and dependent upon the said special resolutions for winding up of the old company, and otherwise as respectively aforesaid, being duly passed and confirmed, and upon these presents, and every term and provision herein contained, being duly authorized and confirmed by the shareholders in the old company respectively as required by law; and if such special resolutions shall not be duly passed and confirmed, or if any term or provision herein contained shall not be authorized and confirmed as aforesaid, this agreement and every clause, stipulation, matter, and thing herein contained shall cease, and be absolutely void to all intents and purposes whatsoever.

In witness, &c.

XXX. *AGREEMENT for regulating an* ASSOCIATION *for* PROSECUTING FELONS, &c. (*a*).

Parties. Recital of situation of parties.

THIS AGREEMENT, made the ——— day of ———, in the year 18—, BETWEEN the several persons whose names are or shall be subscribed to these presents, being inhabitants of, or owners or occupiers of lands within the town of ———, in the county of ———, of the one part; and [*treasurer and solicitor*], of &c., of the other part. WITNESSETH, that the said several persons parties hereto, of the first part, hereby agree to form themselves into an association for the prosecution of felons and persons guilty of theft, and other crimes and offences within [*intended limits*]; AND to give the several rewards hereinafter mentioned, in respect of the following offences, that is to say: the sum of five guineas to any person or persons who shall, during the term of seven years from the date hereof, discover and give evidence of any robbery on the highway, within the said ———; or of breaking or entering any dwelling-house, or any barn, stable, or other building within ———, and stealing, or with an intent to steal, any thing thereout; or of stealing any sheep, horse, cattle, or pig, within the same limits; or of setting fire to any dwelling-house, barn, stable, or other building; or to any stack or rick of grain, hay, straw, or fodder, within the same limits; or of maliciously killing or maiming any cattle belonging to any or either of the persons parties hereto of the first part, and being within the limits aforesaid; And also the sum of three guineas to any person or persons who shall discover and give evidence against any person or persons who shall, during the time aforesaid, and within the limits aforesaid, steal any grain, hay, fowls, household goods, implements or utensils of trade or husbandry, belonging to all or any of the parties hereto of the first part; or be guilty of milking any cow, or of robbing any court-yard, garden, orchard, or field; or of cutting down any timber-tree or trees, grove, or plantation, of or belonging to all, any, or one of the persons parties hereto of the first part; And also the sum of ten shillings and sixpence to any person

Agreement to form association.

Scale of rewards.

(*a*) This precedent is preserved, because its provisions may be useful as a guide in framing agreements for regulating societies whose objects may be other than those mentioned in the text.

XXX. Association for Prosecuting Felons.

who shall discover and give evidence against any person who within the limits aforesaid shall steal any peas, turnips, or potatoes, of or belonging to all, any, or one of the persons parties hereto of the first part; or shall be guilty of breaking any hedges, gates, stiles, posts, poles, pales, or rails; or of stealing any hooks or eyes, or any timber, boards, quarters, or offal-wood, which shall be the property of any or either of the persons parties hereto of the first part, and within the limits aforesaid; Such rewards to be paid on the conviction of the offenders respectively, in addition to the rewards (if any) allowed by Act of Parliament; And to contribute towards the same rewards and the expense of prosecuting such felons, thieves, and offenders, in equal proportions; And to observe the several articles, rules, orders, and regulations hereinafter contained, that is to say:

Rewards to be paid on conviction.

To contribute towards expenses in equal proportions.

1. The association shall continue seven years, to commence from the ——— day of ———.

Association to continue for seven years.

2. The affairs of the association shall be under the conduct, regulation and management of a committee of ——— persons, or any ——— of them, to be chosen from the members for the time being of the association: Such committee shall be elected by ballot at a meeting of the subscribers, to be held at ———, on the ——— day of ———, in every year.

Committee to manage affairs of association.

Election of committee.

3. The committee for the time being, or the major part of them, shall have power to supply any vacancy in their number by death or removal, or refusal to act.

Supply of vacancies.

4. The adjudication of all rewards, and the conduct and direction of all prosecutions, and the settlement of the accounts relating thereto: And the right of making calls on the subscribers for the time being, of money to be paid to answer such rewards, and to defray the expenses of such prosecutions, shall be in the discretion and wholly under the control of the committee for the time being, or the major part of them:

General powers and duties of committee.

5. Each and every call which shall be made by the committee, or the major part of them, shall be answered and paid by the members respectively within one calendar month after notice to them respectively of the same call: And each subscriber shall contribute and pay an equal proportion, according to the number of subscribers, towards all money which shall be called for to answer and pay such rewards, or to defray the expenses of prosecutions and all other incidental

Payment of calls.

XXX. Association for Prosecuting Felons.

expenses: The money which shall be called for from time to time shall be paid to the treasurer for the time being of the said association; and shall be applied and paid by him in such manner and to such persons as the committee for the time being, or the major part of them, shall direct.

Conduct of prosecutions.

6. All prosecutions which shall be conducted on the account, and at the expense of the association, shall be carried on by the solicitor for the time being of the association: And every subscriber shall be entitled to have every prosecution for any offence which, during the said seven years, shall be committed on his person or property within the limits aforesaid, and which he or she shall be duly bound to prosecute, carried on by the solicitor for the time being of the association, at the expense of the association, under the direction and control of the committee for the time being of the association or the major part of them.

7. The committee for the time being, or the major part of them, shall have full power to undertake any other prosecutions for offences committed within the limits aforesaid, at the expense of the association, in those instances in which the poverty or situation of the persons on whose persons or property the offences shall be committed, shall render it expedient that the offender or offenders shall be punished at the expense of the association.

Determination of membership.

8. Each and every subscriber shall cease to be a member of the association from the time he or she shall cease to be an inhabitant, and also, not being an inhabitant, to be an owner or occupier of lands within the limits aforesaid: And each subscriber shall be discharged from his or her engagement herein contained on his or her death, so as not to impose any obligation on his or her heirs, executors, or administrators, for or in respect of any offences which may be committed subsequently to his or her death.

Discharge from liability on death.

Treasurer and solicitor to be elected.

9. A treasurer and solicitor to the said association shall be chosen once in every year by ballot, by the major part of the members who shall be present at a meeting to be held at ———, on the ——— day of ———: The same person may be chosen treasurer and solicitor, or a different person may be chosen to each of these offices: No treasurer or solicitor shall be eligible on any committee: In case of a vacancy in the office of treasurer or solicitor, either by death or any other cause, within any year, such vacancy may be supplied for the

remaining part of the year by the committee for the time being, or the major part of them: THE said [*treasurer or solicitor*] shall be treasurer and solicitor for the said association for the first year. XXX. Association for Prosecuting Felons.

10. The treasurer shall produce his accounts from time to time to the committee, or the major part of them: AND at the end of every year, or on any other election of a new treasurer, the preceding treasurer, or his executors or administrators, shall pay to the succeeding treasurer the balance of the money in hand, as the same balance shall be settled and ascertained by the said committee for the time being, or the major part of them: and the account so stated shall be paid, and such payment be a good discharge. Treasurer's accounts.

11. No account settled or allowed by the committee for the time being, or the major part of them, shall be afterwards opened or questioned: AND all calls made by such committee, or the major part of them, shall be duly answered, without any right to question the expediency or necessity of the same.

AS WITNESS, &c.

XXXI. *AGREEMENT to* BUILD *a House, &c. where no Architect is employed.*

AN AGREEMENT made the ——— day of ———, 18—, BETWEEN [*builder*], of &c. (hereinafter called the builder), of the one part; and [*owner*], of &c. (hereinafter called the owner), of the other part, whereby it is agreed as follows:— Parties.

1. The builder shall forthwith commence, and within the space of ——— calendar months from the date of this agreement, erect, build, and completely cover in and finish upon the land of the owner, at ——— aforesaid, a dwelling-house and buildings according to the plans and specifications set forth in the schedule hereunder written. Builder to erect buildings according to plan.

2. All and singular the works aforesaid shall be executed, according to the said plans and specifications, within the time aforesaid, with the best materials (*a*), and in a good, work-

(*a*) A person who contracts to build a house impliedly undertakes to provide all necessary materials: *Williams* v. *Fitz-Maurice*, 3 H. & N. 844.

XXXI. To Build a House, &c.

manlike, and substantial manner, to the satisfaction of the owner in every respect.

3. The builder shall within ——— days after the completion of the works, remove all his scaffolding, implements and materials.

4. If the works shall not be completed, or if the said scaffolding, implements, and plant shall not be removed within the times hereinbefore respectively mentioned, then, and in either such case, for every subsequent working-day until the completion of the works or the removal of the said scaffolding, implements, and materials, as the case may be, the builder shall pay to the owner £——— as liquidated damages: and it shall be lawful for the owner to deduct any sum which may become payable to him, under or by virtue of this clause, from the money which shall be due to the builder under this agreement.

In case of default, owner may complete and deduct cost.

5. If the builder should from any cause whatsoever fail to complete the said dwelling-house, buildings, and works in manner or within the time aforesaid, and the owner should give or leave notice in writing of such default at the place of abode of him (the builder), and the builder should not proceed to complete the said buildings and works, within the space of seven days after such notice given or left as aforesaid, Then and in any such case it shall be lawful for the owner, without let or hindrance from the builder, or any person or persons employed by him, to purchase materials, And to employ workmen to complete the said dwelling-house, buildings, and works, And to deduct the costs of such materials, and all such sum and sums of money as he shall pay to such workmen, for the completion of such dwelling-house, buildings, and works out of the money which shall be due to the builder under this agreement (*b*): And if the cost of materials and sums so paid to workmen by the owner shall exceed the amount so due to the builder, then the excess shall be paid to the owner by the builder.

Proprietor to pay builder at one payment.

6. The owner shall pay to the builder the sum of £——— within ——— days (*or* months) next after the completion of the said dwelling-house and premises, to his satisfaction as aforesaid (*c*).

(*b*) See *Duckworth* v. *Alison*, 1 Mee. & W. 412.

To the satisfaction of

(*c*) Where a building contract provides for the approval of the

7. If the owner should direct any more work to be done (*d*) in or about the said dwelling-house and premises

Additional work to be paid for.

owner before payment of the remuneration, the owner has a right to be given an opportunity to inspect the work before he can be required to pay; but he must not refuse his approval unreasonably; and it is for the jury to say whether or not such refusal is reasonable: *Dallman* v. *King*, 5 Sc. 382; *Parsons* v. *Sexton*, 16 L. J., C. P. 181, 184.

surveyor or architect.

(*d*) A contract for building a house is clearly not a contract relating to land, or for the sale of goods, within the Statute of Frauds, and unless it is not to be performed within the year, may be made by parol, and if made by writing, may be subsequently varied by parol: *Vide ante*, p. 372 *et seq.* In *Pinner* v. *Arnold*, 2 Cr., M. & R. 613, it was held that an agreement for the purchase of a copper-plate press, to be made and delivered within three months, was within the exemption in the Stamp Act (55 Geo. 3, c. 184), as being an agreement for the sale of "goods, wares or merchandise." See *Cotterell* v. *Apsey*, 6 Taunt. 322; *Heath* v. *Freeland*, 1 Mee. & W. 543. Where a builder contracts for a particular sum, and additions are made to the original plan, the contract remains binding as far as it can be traced, and the excess only is recoverable on a *quantum meruit*: *Pepper* v. *Burland*, Peake, N. P. C. 103; *Robson* v. *Godfrey & Thomas*, Holt, N. P. C. 236; S. C. 1 Stark. 275. See *Hoadly* v. *Maclaine*, 4 Moo. & S. 340; *Jackson* v. *Galloway*, 6 Scott, 786; *Lovelock* v. *King*, 1 M. & Rob. 60.

Additional work.

Contracts for sale of goods and for work and labour distinguished.

While an express contract is subsisting, no compensation can be recovered upon a *quantum meruit* for work done which can be referred to it: *Sinclair* v. *Bowes*, 9 B. & Cr. 92. Thus, where the plaintiff agreed to remove certain rubbish at a specified sum, under a fraudulent representation by the defendant as to the quantity, it was held that he could not recover for the excess: *Selway* v. *Fogg*, 5 Mee. & W. 83. See *Read* v. *Hutchinson*, 3 Camp. 352; *Ferguson* v. *Carrington*, 3 Car. & P. 457; 9 B. & Cr. 59; *Rees* v. *Lines*, 8 Car. & P. 126. So where an architect employed by the defendant to prepare plans and specifications, took out the quantities, and the plaintiff believing they were correct, made a tender, which was accepted, it was held that the plaintiff could not claim more than the contract price, although, by reason of the incorrectness of the quantities, he had expended more materials than he had contemplated: *Scrivener* v. *Pask*, L. R., 1 C. P. 715. In an action for extra work, the written contract must be produced: *Jones* v. *Howell*, 4 Dow, P. C. 176. See *Reid* v. *Batte*, 1 Mood. & M. 413; *Vincent* v. *Cole*, Id. 257; 3 Car. & P. 481; *Fielder* v. *Ray*, 3 Moo. & Pay. 659; *Stephens* v. *Pinney*, 2 J. B. Moore, 349; *Hughes* v. *Budd*, 8 Dow, P. C. 478. But when there is no agreement for a specific sum, or for completion of the work or non-payment, the value of the work done may be recovered from time to time before the completion of the contract, if the work is of a kind that is usually so paid for: *Roberts* v. *Havelock*, 3 B. & Ad. 404.

Express contract excludes any implied promise.

If a fixed price is agreed upon, and the work furnished is of

Effect of furnishing better

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than is mentioned in the schedule hereunder written, the owner shall pay to the builder so much money as such extra work, and the materials used therein, shall amount unto, in addition to the said sum of £———; And if it should be thought proper by the owner to diminish or omit any part of the work in the said schedule hereunder written, Then, and in such case, the builder shall allow out of the said sum of £——— so much money as the work so to be diminished or omitted shall amount unto, upon a reasonable valuation. No extra or additional work shall be done by the builders without the previous order in writing of the owner.

Omitted work to be deducted.

8. All work which may be rendered necessary by reason of the works hereby agreed to be executed by the builders, and also all things which may fairly be inferred from the said plans and specifications, although such works and things respectively may not have been actually specified in the same plans and specification, shall not be deemed to be

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work than that contracted for.

better quality than that stipulated for, this, if it was done without authority, is still only a performance of the agreement, and the party can neither recover an additional compensation, nor have back his work in order that he may substitute an article of inferior quality, but sufficient to satisfy the contract: *Wilmot* v. *Smith*, 3 Car. & P. 453. On a similar principle depends the rule that if a lessee who is bound to repair or replace fixtures, substitutes better articles than those he has removed, he does so for the benefit of the landlord: *Sunderland* v. *Newton*, 3 Sim. 450.

Repairs by tenant.

Work inferior to that contracted for.

But of course evidence that the plaintiff has not performed all that he contracted to do, or that he has not done it so well as he was bound to do it, or that he has varied in other respects from the contract, is admissible in reduction of damages, whether a price was fixed by the agreement or not: *Allen* v. *Cameron*, 1 Cr. & Mee. 832; *Chapel* v. *Hickes*, 2 Cr. & Mee. 214; *Thornton* v. *Place*, 1 M. & Rob. 218. See *Street* v. *Blay*, 2 B. & Ad. 456; *Cutler* v. *Close*, 5 Car. & P. 337; *Baillie* v. *Kell*, 6 Scott, 379. If the party who is to do the work deviates from the specification, he must pay the expense of completing the work according to the contract, and cannot recover the value of the work which was not authorized by the contract: *Thornton* v. *Place*, 1 M. & Rob. 218; *Ellis* v. *Hamlen*, 3 Taunt. 52: And if the work is wholly insufficient for the contemplated purpose, the plaintiff cannot recover at all: *Duncan* v. *Blundell*, 3 Stark. 6; *Farnsworth* v. *Garrard*, 1 Camp. 38; *Denew* v. *Daverell*, 3 Camp. 451; *Moneypenny* v. *Hartland*, 2 Car. & P. 378. See *Basten* v. *Butter*, 7 East, 479; *Grounsell* v. *Lamb*, 1 Mee. & W. 352.

Loss by fire.

As to the effect of loss by fire before the completion of the contract, see *Menetone* v. *Athawes*, 3 Burr. 1592; *Gillett* v. *Mawman*, 1 Taunt. 137; *Tripp* v. *Armitage*, 4 Mee. & W. 687, 699.

additional or extra works within the meaning of this agreement, nor shall the builders be entitled to any additional payment in respect thereof.

Arbitration clause (*e*).

9. If any dispute or difference should arise touching or concerning the dwelling-house, buildings, and works, hereby covenanted to be made and done as aforesaid, or touching or concerning any other matter or thing whatsoever, relating to the work hereby contracted to be done, or such additional or extra work as aforesaid, Then such dispute or difference shall be left to the determination and award of three indifferent persons, one to be named by the [*builder*], another by the [*owner*], and the third to be chosen by the said two persons so to be named as aforesaid, immediately or within ten days after notice of such dispute or difference; and the decision of the three persons so to be chosen, or of any two of them, shall be final.

In witness, &c.

XXXII. *BUILDING AGREEMENT for making extensive* Alterations *of, and* Additions *to a* House *in London.*

AN AGREEMENT made the ——— day of ———, 18—, Between [*builders*], of &c., of the one part, and [*owner*], of &c., of the other part. Whereby it is agreed as follows:—

Agreement for execution of works.

1. The said [*builders*], in consideration of the sum of £———, to be paid to them by the said [*owner*], as hereinafter mentioned, will at their own costs and charges, execute certain works in alterations of and additions to No. 100, ——— Street, W., according to the drawings numbered 1 and 2, and the specification severally signed by them, such several works to be done under the direction and to the entire satisfaction of Messrs. ——— [*architects*], of &c., or other the architects for the time being appointed by the said [*owner*] (who are hereinafter referred to as the architects), to superintend the works

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(*e*) Other forms of arbitration clauses in building agreements will be found *post*, pp. 546, 547.

XXXII. Building Agreement, Town-house.

in accordance with the requirements of the local authorities, and upon the conditions hereinafter specified.

Builders to provide proper materials, &c.

2. The said [*builders*], shall at their own costs and charges provide all necessary labour, strong and secure scaffolding, moulds, and implements of every kind necessary for carrying on and completing the works, and also all materials required for the due performance of this contract, which are to be the best of their several sorts and kinds mentioned in the said specification.

Notices to local authorities.

3. The builders shall give the proper notices to, and pay the fees of the district surveyor of the Metropolitan Board of Works, and all other public bodies and officers entitled thereto, and shall perform and do all things required by them respectively.

Defects to be made good.

4. The architects may at any time inspect the works and materials supplied for the execution of the same. If at any time during the progress of the works above mentioned, any improper or defective materials or workmanship be observed, upon notice being given in writing, the said materials shall be immediately removed from off the premises, or the said workmanship shall be immediately made good at the cost of the said [*builders*]; or the architects shall be at liberty to remove or make good the same as the case may be, and deduct the expense of such removal or making good from the amount of the consideration-money hereinafter mentioned.

Alterations, &c. in works.

5. Should any alteration, variation, or omission be made in the works, the same shall not make void or invalidate this agreement, nor vary the time hereinafter fixed for completion of the works, unless an extension of time shall be allowed by an order in writing of the architect (*a*), but the value of any such alteration, variation, or omission as aforesaid, shall be estimated by the architects and be added to or deducted from the amount due under or by virtue of this agreement as the case may be. No extra works are to be done without the previous order in writing of the architects.

Bills of quantities.

6. If any errors shall be discovered in the detailed bills of quantities, the same shall be rectified, and an addition to or deduction from the amount payable to the builders under or

(*a*) A provision similar in effect to that in the text was strictly enforced in the case of *Jones* v. *St. John's College*, L. R., 6 Q. B. 115.

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by virtue of this agreement, shall be made accordingly; provided always, that the builders shall notify in writing to the architects the discovery of any such error within ——— days from the date hereof, after which time no question as to the accuracy or otherwise of the said bills of quantities shall be entertained (*c*).

Commencement and execution of the works.

7. The works are to be commenced on or before the ——— day of ———, 18—, and to be executed in a proper and substantial manner in every respect, and to be completed on or before the ——— day of ——— next (with the exception of new dining-room and stable building above basement level, which are to be completed on or before the ——— day of ———), in default whereof the said [*builders*] shall forfeit and pay to the said [*owner*] the sum of 50*l.* per week as liquidated damages in each case, for every week during which the said works shall remain unfinished. Payments to be made by the said [*owner*], from time to time, as the works progress as hereinafter mentioned. The said specifications and drawings hereinbefore mentioned are to be considered as embracing all the works necessary to be done in order to finish completely the several works therein mentioned, although the details may not be clearly and specifically expressed.

Bills of quantities.

(*c*) This clause touches a most important question to contractors. It has, until recently, been the custom to refer in the contract to the plans and specifications only, the contractor being supplied by the architect with bills of quantities from which to make his tender. In such a case the builder takes the whole risk of the bills of quantities being inaccurate, or being prepared, as they often are, by incompetent persons, and may either find that he has lost the contract by making an extravagant tender to secure himself, or that his tender, having been accepted, he has to do work for which he has no prospect of being paid. This uncertainty, which has done great harm to the building trade, is obviated by the above condition, which is in every way fairer to contractor, architect and proprietor, and is being largely adopted by the trade. For the results of depending on the accuracy of bills of quantities, see *Kemp* v. *Rose*, 1 Giff. 258; *Kimberley* v. *Dick*, L. R., 13 Eq. 1; *Scrivener* v. *Pask* (Ex. Ch.), L. R., 1 C. P. 715.

In the latter case the contractors attempted to recover where the bill of quantities was no part of the contract, and *Blackburn*, J., said, that to entitle the plaintiffs to recover they must make out three things; that the architect was the defendant's agent, that the architect was guilty of fraud or misrepresentation, and that the defendant knew of and sanctioned it.

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Drawings and Specifications.

8. Complete copies of the drawings and specifications, signed by the architects, shall be furnished by him to the builders, for their own use, and shall be kept on the premises in charge of a competent foreman, who shall be constantly at the works and shall be employed by and shall represent the builders for the purpose of receiving notices, orders, and instructions.

Contract not to be assigned, &c.

Cesser of contract on builders' bankruptcy, &c.

9. No part of the work shall be assigned or underlet unless with the consent in writing of the architects. In case of the bankruptcy of the said [*builders*], or of their entering into any composition with their creditors, or of their not proceeding with the works with sufficient dispatch, the architects shall be at liberty, after ——— days' notice in writing to the said [*builders*], to employ other persons to complete the works, and to take possession of all the material on the site, and to deduct the cost of completion from the sum then due under or by virtue of this agreement to the said [*builders*]. The said [*owner*] shall not be liable for any loss of materials, or for injury done to them during the execution of the works.

Payment.

10. The said consideration money, or sum of £———, shall be paid by instalments, as the works progress, as follows, subject as hereinafter mentioned, that is to say: On the ——— day of ———, 18—, £———; on the ——— day of ———, 18—, £———; on the ——— day of ———, 18—, £———; and on the ——— day of ———, 18—, the balance, £———; but no payment made as aforesaid shall exceed 75 per cent. on the value of the work done up to the time of such payment, such value to be determined by the architects.

Injunction.

11. In the event of any proceedings for an injunction or otherwise being instituted and successfully maintained against the said [*owner*] in respect of the said works or new buildings, or any part thereof, the said [*owner*] shall only be liable to pay to the said [*builders*] the actual value of the works executed and properly prepared up to the date of the successful termination of such proceedings, and the consequent stoppage of the works; [the amount so payable to be determined by the architects alone, whose decision shall be final in the matter.] The said [*owner*] shall not be liable in damages or otherwise to the said [*builders*] in respect of any loss or alleged loss caused to them by the stoppage of such work, nor for any materials provided by them in anticipation of such works being carried through or otherwise, except as

XXXII. Building Agreement for Enlarging a Town House.

aforesaid: Provided, nevertheless, that nothing herein contained shall affect this agreement with reference to any works or buildings which shall not be included in such proceedings, and stopped as aforesaid.

Settlement of disputes by architects (*d*).

12. All questions, disputes, or differences (if any) which shall arise between the parties hereto touching any matter or thing relating to this agreement, shall be submitted to the sole and final determination and award of the architects, and the said parties hereto respectively shall and will abide by and perform the said determination and award, to be made in writing, under the hands and seals of the architects, and to be delivered to the said parties hereto: And the submission hereby made may, at the option and the expense of either of

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(*d*) This is the clause ordinarily inserted in a contract of this nature.

But there are many reasons why the architect is not an independent arbitrator between the builder and the proprietor in all cases, especially where the architect has given a guarantee to his client that the cost of the building shall not exceed a certain sum. See *Kemp* v. *Rose*, 1 Giff. 258; *Kimberley* v. *Dick*, L. R., 13 Eq. 1.

The following clause is therefore suggested as an alternative:—

Reference to arbitration.

In case any question, dispute, or difference shall arise between the said [*owner*], or the architects on his behalf, and the said [*builders*], as to what additions, if any, ought in fairness to be made to the amount of the said consideration money, by reason of the works being delayed through no fault of the said [*builders*], or by reason or on account of any directions or requisitions of the architects, involving increased cost to the said [*builders*], beyond the cost properly attending the carrying out this contract according to the signed drawings and specifications, or as to the works having been duly completed, or as to the construction of these presents, or as to any other matter or thing arising under or out of this contract, except as to matters left during the progress of the works, to the sole decision or requisition of the architects under clause ———, or in case the said [*builders*] shall be dissatisfied with any certificate of the architects, or in case they shall withhold or not give any certificate to which the contractors may be entitled, then such question, dispute, or difference, or such certificate, or the value or matter which should be certified, as the case may be, shall be from time to

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the parties who shall so desire, be made a rule of her Majesty's High Court of Justice.

As WITNESS, &c.

XXXIII. *BUILDING AGREEMENT between* CONTRACTORS *and a* COMMITTEE *for the Erection of a* PUBLIC BUILDING (*a*).

Parties.

THIS AGREEMENT made the ——— day of ———, 18—, BETWEEN A. B. and C. D., of &c., builders (hereinafter called the contractors), of the one part; and E. F., of &c. G. H., of &c., and I. K., of &c. (hereinafter called the committee), of the other part, WITNESSETH that for the consideration hereinafter stated the contractors hereby agree with the committee, as follows:—

Contractors to erect buildings according to plans, &c.

1. The contractors will build and complete, within ——— months from the time when they are put in possession of the ground, for the sum of £———, a [church] at ———, in the county of ———, according to the plans and specifications

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time referred to the arbitration and final decision of ———, architect, or in the event of his death or unwillingness to act, then of ———, architect, and in the event of his death or unwillingness to act, then of an architect, being a Fellow of the Royal Institute of British Architects, to be appointed on the request of either party by the President for the time being of such institute, and the award of such referee shall be equivalent to a certificate of the architect, and the contractors shall be paid accordingly. Such award or certificate may be made a rule of Her Majesty's High Court of Justice, or of any Court of Record in England. The costs of the arbitration and award shall be in discretion of the arbitrator.

As WITNESS, &c.

(*a*) This Precedent is inserted by the kind permission of Sir Edmund Beckett, Bart., Q.C., and taken (with slight modification) from his "Book on Building," p. 37. This form of contract has been used, with slight variations, in numerous building operations, including those recently carried out at Lincoln's Inn. It may readily be adapted to the case of a single builder or employer.

and directions from time to time of Mr. ———, the architect, or such other architect as may from time to time be employed by the committee, including all things which in the opinion of the architect may fairly be inferred from such plans and specifications to be intended without being actually specified.

Alterations and additional works.

2. The contractors shall also execute all such alterations and additional works as shall be ordered by the architect, with the consent of the committee or by the committee. But if the contractors shall be of opinion that any such alteration or addition will cause additional expense, they shall not be bound to execute the same without an order in writing from the committee, stating the price which is either agreed on or certified by the architect as the proper sum to be allowed for the same, after giving credit for the value of any omissions which have been ordered, and such order shall state also the extension of time (if any) which is to be granted by reason thereof. And neither the contractors, nor any sub-contractor under them, shall be entitled to recover from the committee, or any member thereof, any more than the said sum of £———, together with the amount of the sums contained in all such orders as last aforesaid; nor shall this clause be held to have been waived in consequence of anything to be done by the committee, or any member thereof, except an express waiver in writing, and then only as to the particular things included therein. The contractors shall, if required for the valuation of extras, produce the bill of quantities, with the prices attached thereto, on which their tender was based.

Architect's powers.

3. The contractors shall follow the directions of the architect in all respects, and of the clerk of the works in his absence, subject to the last preceding clause; but neither of them shall be considered for any purpose the agent of the committee, nor have any power to act contrary to their directions. And the whole of the work shall be done to the satisfaction of the architect. But the passing or certifying of any work by the clerk of the works, or by the architect himself, shall not exempt the contractors from liability to replace the same if it be afterwards discovered to have been done ill, or not according to the plans and specifications, either in execution or materials.

Defects in work to be made good.

4. If anything shall be discovered to have been done in an inferior way, or contrary to the specification or plans,

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and especially (but without prejudice to other questions) if any masonry or wood-work shrinks, cracks or opens in the joints, either before the work is certified to be complete, or within a year afterwards, the contractors shall make good the same, not by patching, but by substituting new work, which shall be subject to the same condition; and if any payments are still due to the contractors, they shall be suspended until such defective work has been made good to the satisfaction of the architect, and subject to this condition.

Payment.

5. Payment shall be made to the contractors at the rate of £300 for every £400 worth of work certified in writing by the architect to have been done(*b*), or of materials delivered on the ground, and all materials shall become the property of the committee as soon as they are delivered, subject to the right of the contractors to remove all surplus materials when the work is finished (*c*).

Balance.

6. When the amount so kept back has reached one-tenth of the whole amount of the contract, the contractors shall be paid £90 per centum on each further sum certified by the architect to be due. And all such payments of instalments shall be made within three weeks after the architect's certificate has been received, unless the committee dispute the propriety thereof. And half the balance remaining due shall be paid in three months after the architect's final certificate, that the work has been completed according to the contract, has been delivered to the committee, and the other half in six months, unless some defect has been meanwhile discovered as

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(*b*) Where the right of a builder to receive payment is made to depend upon the approval of an architect or surveyor, the right to sue for the remuneration does not arise until the certificate of such approval is produced: *Morgan* v. *Birnie*, 3 Moo. & Sc. 76; *Mayor, &c. of Salford* v. *Ackers*, 16 M. & W. 85; *S. C.*, 16 L. J., Ex. 6; *Moffatt* v. *Dickson*, 13 C. B. 543; *S. C.*, 22 L. J., C. P. 265; *Scott* v. *Liverpool Corporation*, 3 De G. & J. 334; *S. C.*, 25 L.J., Ch. 230. The Court will relieve against improper withholding of the certificate; *Milner* v. *Field*, 5 Ex. 829; 20 L. J., Ex. 68; *Batterbury* v. *Vyse*, 2 H. & C. 42; *S. C.*, 32 L. J., Ex. 177; and also against partial or corrupt decisions of the architect or surveyor: *Bliss* v. *Smith*, 34 Beav. 508; *Kimberley* v. *Dick*, L. R., 13 Eq. 1. Unless the certificate is expressly required by the contract to be in writing, the architect's verbal approval is sufficient: *Roberts* v. *Watkins*, 14 C. B. (N. S.) 592; *S. C.*, 32 L. J., C. P. 291.

(*c*) In small undertakings the proportionate payments will be smaller, and *vice versâ*.

aforesaid, or the committee *bonâ fide* dispute their liability to pay on some other ground.

Penalty for delay in completion.

7. The balance due to the contractors shall be diminished by £———, for every day that the work is not completed after the time hereinbefore fixed for the completion thereof. But the architect shall have power to extend the time for any good cause, such as strikes of workmen, or bad weather, or additions or alterations ordered by the committee, such extension to be certified by him to the committee at the time when such cause arises, or as soon as it has ceased.

Determination of contract on bankruptcy of contractors.

8. If the contractors or either of them shall become bankrupt, or assign their or his property for the benefit of creditors, or become otherwise unable themselves to carry on the work, or neglect to do so at any time for a fortnight in the manner required by the architect, or refuse to follow his directions as to the mode of doing the work, the committee may at once terminate the contract, and thereupon all claim of the contractors or contractor so acting shall cease, and the committee may employ such other persons or person to complete the work as they shall think fit. And in that case no scaffolding or fixed tackle of any kind shall be removed, so long as the same is wanted for the work. But if any balance on the amount of this contract remains after completion in respect of work done during the time of the defaulting contractors or contractor, the same shall belong to the persons legally representing them or him, but the committee shall not be liable or accountable to them in any way for the manner in which they may have got the work completed.

Notices and orders of committee.

9. All notices or orders from the committee, or the architect, may be either given, or sent to, or left for the contractors, or either of them, by post at the works, or at their usual place of residence or business. And every person employed on the work by the contractors, whether by a sub-contract or otherwise, shall be considered their agent or servant. And any order or notice signed by the secretary or other person on behalf of the committee, shall be treated by the contractors as the order or notice of the committee, until the same is revoked or altered. And all certificates and other things which have to be sent to the committee, may be sent or delivered to the secretary or chairman, or other person appointed by them for that purpose.

XXXIII. Building Agreement for Erection of a Public Building.

10. It is to be understood that the contractors and workmen are only admitted to the ground for the purpose of building, and have no tenancy thereof, and any workman misconducting himself or found to be doing his work improperly there, may be discharged or removed, if necessary, by the committee or the architect, or clerk of the works.

Workmen's misconduct.

Damage and insurance.

11. The contractors shall be answerable for all damage to the building during construction, and until the same has been certified by the architect as complete, and shall keep it insured to an amount equal to the value of the work done from time to time (*d*), and shall deliver up the building to the committee in perfect repair, clean, and in good condition when complete.

In witness whereof the parties hereto have hereunto set their hands and seals this ——— day of ———, 18—.

XXXIV. *AGREEMENT to employ an* Agent *in a Colony at a Salary, with a Percentage on Sales.*

Parties.

THIS AGREEMENT made this ——— day of ———, 18—, Between [*merchants*], of &c., of the one part, and [*agent*], of &c., commercial agent, of the other part:

Testatum.

Whereby it is agreed by and between the parties hereto as follows:—

Interpretation clause.

1. In this agreement the term "the agent" means the said [*agent*], and the term "the principals" includes the said [*merchants*], and the survivors and survivor of them, and

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(*d*) In the case of additions to an old building add—

"And shall also be answerable for all injury to the existing building from any cause which might have been prevented by them or their workmen, or any one employed by them."

The employer should always, except if dealing with great contractors of established reputation, insist on the builder finding sureties to be approved by the employer (if thought necessary), for an amount equal to one-third of the tender or thereabouts. The sureties should be bound severally and jointly. See Sir E. Beckett's Book on Building, p. 35. For form of bond, *vide post*, vol. ii., sub tit. Bond.

such person or persons as may from time to time be copartner or copartners in trade with them, or the survivors or survivor of them, and their respective executors, administrators, and assigns.

XXXIV. Employment of Colonial Agent by Merchants.

2. The principals shall employ the agent as their agent, to take care of, conduct, and manage a certain store or warehouse, belonging to the principals, situate at ———, in the British settlement called Prince Edward's Island, in the Gulf of St. Lawrence, in North America, with full and free power and liberty to buy, sell, barter, or exchange any merchandize, stock, cattle, timber, colonial produce, manufactures, corn, hay, or any other article the agent may deem or consider profitable to the interest and benefit of the principals, from the ——— day of ——— now next ensuing, for and during the term of ——— years.

Engagement of agent for a fixed term.

3. The principals will, during the said term, pay to the agent for his services the annual salary of £———, by equal quarterly payments on the ——— day of ——— &c. in each and every year, without any deduction except for income tax, and will make the first payment of the said salary on the ——— day of ———, next ensuing the date of these presents. And further, that the agent shall be allowed a commission of £5 per cent. on all sales above the sum of £——— per annum, which the agent may make or effect, for or on behalf of the principals, in addition to his said annual salary of £———: And further, that if after the expiration of the said first year of the said term of ——— years, the sales to be effected by the agent shall not produce more than the sum of £———, The principals do hereby further agree to pay and allow to the said agent during the remainder of the said term of ——— years, as a remuneration for his exertions, the annual salary of £———, in addition to the aforesaid annual sum of £———, to be paid and payable at the same times, and in the same manner as is hereinbefore appointed and provided for payment of the said annual salary of £———; And which annual salary or salaries, and percentage, the agent shall and may be at liberty to deduct and retain, by and out of the first moneys which shall come to the hands of or be received by him.

Salary.

Commission on sales beyond a certain value.

Additional salary in lieu thereof, if sales fall short of a certain amount.

Agent may retain salary.

4. The principals will, at their own proper costs and charges, find and provide for the agent all kinds of goods,

Principals to supply goods, &c.

XXXIV. Employment of Colonial Agent by Merchants.

wares, merchandizes, and other articles and things of every nature and description whatsoever, which he may demand or deem requisite for the carrying on and conducting the said store or warehouse, or otherwise in the execution, conduct, or management of his office as such agent as aforesaid, so as he may be enabled to effect sales, and manage, conduct, and carry on the said store or warehouse to the greatest advantage and benefit of the principals.

Agent may reside in adjoining house with his family without paying rent.

5. The agent and his wife, family, and servants, shall and may be at liberty to reside in and have the use and occupation of the dwelling-house, and all other the premises, with the appurtenances, now the property of the principals, which adjoin or belong to the said store or warehouse, without paying any rent for the same; and which dwelling-house the principals hereby undertake and agree, by and at their own costs and charges, to furnish, with suitable household and other furniture of every nature and description whatsoever, to the approbation of the agent.

Principals to furnish house.

Principals to provide clerks, &c.

6. The principals will, at their own proper costs and charges, find and provide the agent with suitable assistants, servants, and workmen, to be under and assist the agent in the business of the said store or warehouse, and in and about the exercise of his office, as agent to the principals.

Principals to provide board and lodging for agent's family, clerks, &c.

Agent to deduct expenses.

7. The principals will also find and provide the agent and his wife, family, and servants, and all servants and workmen, both male and female, who may be so as aforesaid employed by the agent to assist under him, with suitable board and lodging, and everything necessary or incident thereto: And all such sum and sums of money, costs, charges, and expenses which may be incurred or sustained in the providing of such board and lodging, and also in the payment of all assistants, servants, workmen, and other persons' wages who may be employed for the purposes aforesaid, the agent shall be at liberty to deduct, retain, and reimburse by and out of the first moneys which shall come to his hands.

Principals to send out agent with his family and goods at their expense.

8. The principals will, at their own costs and charges convey the agent, and his wife, family, and servants, and any household or other furniture, goods, chattels, property, or effects which the agent or his family or servants may think proper to take with them to the said island; and

XXXIV. Employment of Colonial Agent by Merchants.

also will pay all railway and other fares, and hotel and other expenses of and incident to any journeys which the agent shall at any time hereafter be required by the principals to take for the purposes of their said business.

Agent may determine agreement on giving notice.

9. In case the agent should not approve of the situation as agent to the principals in the said island, or in case the climate should not agree with the health of himself or family, the agent shall and may, upon giving notice in writing to the principals, be at liberty to give up his employment as such agent as aforesaid, and to return to England, and then, and in such case, these presents, and every clause, matter, and thing herein contained shall cease, determine, and be utterly void, to all intents and purposes, any thing to the contrary thereof in any wise notwithstanding; and in such case the principals will, upon the expiration of such notice, so to be given as aforesaid, at their own proper costs and charges, reconvey the agent and his wife, family, and servants, and any goods, chattels, property, or effects they may think proper to bring back again with them, to the port of London.

Principals to bring agent and family and goods home.

Agent to act diligently and faithfully during term.

10. The agent will, during the said term of ——— years, if he shall so long live, well, diligently and faithfully, to the utmost of his power, serve the principals as their agent, and take upon himself the care, conduct, and management of their said trade of merchandizing at the said store or warehouse; And will, at all times during the said term, receive and take into his care and custody, all such goods and merchandizes whatsoever as aforesaid, and as by or for the use, or on the account of the principals shall be conveyed or sent to the agent, and will sell, barter, and dispose of the same goods and merchandizes to the best profit he can for the principals; And also will, at all times during the said term, follow and perform the advice, direction, and orders of the principals, which shall, by letters or otherwise, be sent, given, or made known to him the agent, concerning the said store or warehouse and merchandizes as aforesaid.

To receive goods, and dispose of goods.

To obey directions of principals.

To keep books of account.

11. The agent will, at the costs of the principals, provide and keep in good order books of account, concerning his employment as such agent as aforesaid, according to the custom of agents to merchants in such cases: And will deal justly, truly, and faithfully to and with the principals in all and every his accounts, reckonings, bargains, and dealings,

To deal justly.

XXXIV. **Employment of Colonial Agent by Merchants.**

relating to and concerning his said employment as such agent as aforesaid; And will constantly, once in every year during the said term of ——— years, determinable as aforesaid, transmit and send to the principals true accounts of all the business and dealings of him the agent in the premises; And also will send letters of advice to the principals of all such measures and occurrences wherewith it shall be proper and expedient that the principals be acquainted.

To transmit accounts annually.

To advise principals of all important matters.

12. The agent will, from time to time, upon every reasonable request of the principals, show forth and produce to them, or either of them, all his books of account, concerning all such his dealings aforesaid, and make and give to them a just and perfect account of and concerning all and every such goods, wares, money, and merchandizes of the principals which shall hereafter come to his hands and charge, or for which he should or ought to be accountable to the principals; and, moreover, that he will, within ——— months after such annual account shall be made or given in, well and truly satisfy and deliver over to the principals all and every such wares, money, goods, merchandizes, and other effects and things, as by such account shall appear to be due to the principals from the agent.

To produce books of accounts, on request.

To render goods or moneys due.

As WITNESS, &c.

XXXV. *AGREEMENT to employ a* FACTOR, *to be remunerated by a Share of Profits, with weekly Drawings.*

AN AGREEMENT, made the ——— day of ———, 18—, BETWEEN [*factor*], of &c., of the one part; and [*four copartners, principals*], all of &c., of the other part. WHEREBY it is agreed by and between the said parties hereto as follows, that is to say:—

Parties.

Recital of agreement to act as factor.

1. In this agreement the term "the factor" means the said [*factor*], and the term "the principals" includes the said [*principals*], and the survivors, and survivor of them, and such person or persons as may from time to time be copartner or copartners in trade with them, or the survivors or

Interpretation clause.

survivor of them, and their respective executors, administrators and assigns.

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2. The factor will act as the factor or agent of the principals in the vending of ———, for the term of ——— years from the date hereof, determinable nevertheless as hereinafter mentioned, and will conduct and carry on the said agency, at the shop or warehouse of the principals, in ——— street, in the city of London, or in such other shop or warehouse, in the said city of London, as they may direct or appoint for that purpose.

Agreement to act as factor for —— years.

3. The factor will devote and give his whole time and attention to the said agency, and will not engage in the business of a seller of ———, or in any other business whatsoever, either on his own account, or as a factor or agent, and either alone or in copartnership with any person or persons whomsoever.

Conduct of business.

4. The factor will carefully deposit and preserve, in the shop or warehouse for the time being made use of for the purpose of the said agency business, all such goods, wares, and merchandizes, as may be sent or transmitted to him by the principals.

To take care of the goods committed to his charge.

5. In managing and conducting the said agency, the factor will use his best endeavours to procure the greatest possible sale of the ——— and other goods which he shall be employed to sell as such factor as aforesaid, either for ready money, or to persons whom, after due inquiries, he shall ascertain to be persons of responsibility, and worthy to be trusted; And, upon making every such inquiry, will make a minute or memorandum thereof, in a book to be kept for that purpose, specifying the name of the person applying to purchase on credit, the name or names of the person or persons applied to for the purpose of knowing whether such person might be trusted with safety, and also specifying what was said upon the subject by such person or persons so applied to.

To procure best sale for ready money or to persons of good credit.

6. The factor will not give credit to any person or persons for a greater length of time than ———, without the consent in writing of the principals; And will not, without such consent, sell to any person on credit to a greater amount than the sum of £———.

Limits as to giving credit.

7. The factor will, in conducting the said agency, con-

To act according to directions of principals.

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form to and govern himself by such orders, instructions, and directions, as he may from time to time receive from the principals; And that in all cases where he shall receive no special orders or directions, he will act in such manner as he shall judge to be most conducive to the advantage of the principals.

In absence of special orders, to act for benefit of principals.

8. The factor will, from time to time, account for and transmit to the principals all moneys, bills, and securities for money, received from the sale of any ———, or other goods sold by the factor, as such factor or agent as aforesaid.

To account for and transmit moneys, &c. received to principals.

9. The factor will, from time to time, in case he has assets in his hands, accept and duly pay all such bill and bills of exchange as may be drawn upon him by the principals, and of which he may receive due notice from them, or the survivors or survivor of them.

To accept principals' bills when he has assets in hand.

10. The factor will, from time to time, on the first day of every month, send and transmit to the principals a full, clear, and correct statement in writing of all orders, both taken and executed, and of all goods which may have come to his hands; and also of all such goods as he may have sold, to whom, and whether for ready money, or on credit; and likewise of all such other matters, transactions and things, as in anywise concern the said agency business, and which may have taken place during the preceding month.

To transmit monthly account of affairs to principals.

11. The factor will keep books of account, in which shall be made plain and correct entries of all goods received from the principals, and also of all goods sold and delivered by him, the factor, as such factor or agent as aforesaid, and also of all orders received and taken; and of all other matters, transactions, and things, in anywise concerning the said agency business: And will, on the ——— day of ———, and the ——— day of ———, in each and every year, unless either the said days shall happen on a Sunday, and in that case on the day following, accurately cast up and balance the said books of account, in order that the true state of the said agency business may clearly appear therefrom.

To keep account books.

To balance account books every half-year.

12. It shall be lawful for the principals, or any of them, at all seasonable hours in the day-time, to have free access to the said books of account, and to all other books, papers, documents, and writings in anywise touching or concerning the said agency

Principals to have access to inspect the accounts, &c.

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business; and to take copies of or extracts from the same or any of them; And which books of account, papers, documents, and writings, he, the factor, will carefully preserve (damages by fire and other inevitable accidents only excepted); and, upon the final settlement and winding up of the said agency business, will give and deliver up the same books, documents, and writings, undefaced and unobliterated, to the principals, or other the person or persons lawfully entitled thereto.

Account books to be carefully preserved.

13. Upon the taking of every half-yearly account, as provided by the ——— clause hereof, a copy of such account, signed by the factor, and verified by the statutory declaration of himself, or of the person or persons whom he shall have employed to make up the said account, shall be forwarded to the principals, and shall, unless the principals, or any of them, shall within ——— days after the receipt thereof object to the same, and notify such objection in writing to the factor, be deemed to be finally settled and binding upon the parties hereto respectively.

Copies of accounts to be forwarded to principals.

14. Upon the settlement of each half-yearly account the factor shall be entitled to receive one ———th share of such a sum as shall by such account be shown to represent the gross profits of the business carried on at the shop or warehouse of the principals at ——— street aforesaid, for the preceding half year.

Factor entitled to share of gross profits.

15. The factor may every week, during such time as he shall act as such factor or agent as aforesaid, draw out for his own use, on account of his share in the said gross profits, the sum of £———; but if at the end of any half year it shall appear, upon taking the half-yearly account as aforesaid, that the share of gross profits, to which he is entitled at that date, does not amount to the aggregate of the weekly drawings made by him during the then preceding half year, then he shall within ——— days after such account shall have been taken as aforesaid, refund the difference, but without interest.

Weekly drawings.

16. The factor, during such time as he shall act as such factor or agent as aforesaid, shall have the exclusive right, with his family and servants, to reside in the dwelling-house, with the appurtenances, over the said shop or warehouse, in ——— street aforesaid, free from the payment of rent or taxes for the same.

Factor to reside in rooms over warehouse, rent free.

17. The factor will, at his own costs and charges, find

Factor to pro-

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and provide a clerk who writes a good hand, and understands accounts and book-keeping, for the purpose of constantly assisting him, the factor, in the management of the said agency business: And also, find and provide a porter for the purpose of assisting in the said business.

vide a clerk and porter.

Repayment to factor of sums paid for carriage of goods, &c.

18. The principals will pay to the factor, once every six months, all such sums of money as he may have paid, for or on account of books, paper and stationery, made use of in and about the said agency business; And also all such sums as he may have paid for the postage of letters relating to the said agency business; And for the carriage of goods, wares, and merchandizes sent to him by the principals.

No other person to be employed as factor.

19. The principals will not employ any other person as a factor or agent in the vending of ———, within the city of London, during such time as the said factor shall act as such factor or agent as aforesaid.

Factor not to be answerable for involuntary losses.

20. The factor shall not be answerable for any loss or damage which may happen to or be incurred in or about the said business conducted by him as such factor or agent as aforesaid, unless such loss or damage happen through his wilful neglect or default.

Power for factor to determine agreement on giving —— months' notice.

21. In case the factor shall, at any time before the expiration of the said term of ——— years, be desirous of giving up the said agency business, it shall be lawful for him so to do, upon giving six calendar months' previous notice in writing of such his intention to the principals, or by leaving such notice at their usual places or place of abode.

Power for principals to discharge factor, on giving —— months' notice.

22. If the principals shall, at any time before the expiration of the said term of ——— years, be minded and desirous to discharge the factor from being such factor or agent as aforesaid, it shall be lawful for them so to do upon giving six calendar months' previous notice in writing of such intention, or upon leaving such notice at the shop or warehouse for the time being made use of by the factor in the said agency business, anything herein contained to the contrary notwithstanding.

Proportionate allowance in lieu of profits in case of death, &c.

23. In case of the death of the factor before the expiration of the said term of seven years, or of his resignation or discharge as hereinbefore provided, his executors or administrators, or himself, as the case may be, shall immediately upon the happening of any such event be entitled to receive a pro-

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portionate allowance in lieu of profits to be calculated as from the last preceding half-yearly account taking, and according to the share of profits (if any) of the factor as shown by the same account taking. If, at the time of the happening of any such event as in this clause mentioned no half-yearly account shall have been taken, a special account shall be taken for the purpose of ascertaining the allowance to be made.

Arbitration clause.

24. If at any time the principals or any of them shall object to the half-yearly accounts rendered and forwarded to them in manner aforesaid, or if any dispute or difference shall at any time arise between the factor or his executors or administrators, on the one part, and the principals or any of them, on the other part, for or on account of any matter or thing herein contained which shall not within one calendar month after the same shall arise be fully decided between the parties in difference themselves, Then and in every such case, the matter of every such account, difference or dispute shall be referred to the hearing of three indifferent persons, to be chosen, one by the factor or his executors or administrators, another by the person or persons in difference or dispute with him or them, and a third by the two first persons so first chosen: And the award and determination of the said three persons so to be chosen as aforesaid, or of any two of them, in the matters referred to them, shall be binding and conclusive.

Power of attorney to factor to receive debts.

25. And for the purpose of better enabling the factor to receive and get in all debts and sums of money for or on account of any goods, wares and merchandizes which may be sold by him as such factor or agent as aforesaid, they, the principals, by these presents, appoint the factor their attorney, for them, and in their names or otherwise, and for their use, to ask, sue for, recover and receive, all and every such sum and sums of money as shall or may be due or owing from any person or persons, for or on account of any goods or merchandizes sold by him as their agent or factor as aforesaid, and to give receipts and sufficient discharges for the same; they the principals hereby ratifying and confirming all and whatsoever he the factor shall lawfully do or cause to be done in and about the premises; and any attorney or attornies under him the factor to substitute

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and appoint, and such substitution and appointment at pleasure to revoke (*a*).

No partnership created.

26. Nothing herein contained or to be done in pursuance hereof shall be construed or taken in any way so as to constitute a partnership between the factor and the principals, or so as to give to or impose upon the factor any of the rights or liabilities of a partner in the same business (*b*).

In witness, &c.

XXXVI. *AGREEMENT for the* Employment *of a* Manager *of a Limited Company at a fixed Salary and Commission on Profits.*

Parties.

ARTICLES OF AGREEMENT made this ——— day of ———, Between the ——— Company (Limited), of the one part, and A. B., of &c., of the other part. Whereby it is agreed by and between the said parties hereto as follows:—

Agreement for service and salary.

1. The said A. B. (who since the ——— day of ——— last has been) shall henceforth continue and be one of the general managers in London of the said ——— Company (Limited) (hereinafter called the company), for the term of seven years, to be computed from the ——— day of ——— aforesaid, if he shall so long live, at a salary computed at and after the rate of £——— a year for the first year of the said term, and thereafter to be computed at the rate of £——— for every subsequent year of the said term, and the company shall pay such respective salaries to the said A. B. (hereinafter called the manager), by equal quarterly payments, within ——— days after the said payments shall become due respectively, and shall pay to his executors or administrators a proportional part of the said salary for the interval between the last quarter day and the death of the said manager;

(*a*) As to the power of a factor to pledge the property of his principal, *vide Phillips* v. *Huth*, 6 Mee. & W. 572; *Nicholson* v. *Hooper*, 4 Myl. & Cr. 179; *Jewan* v. *Whitworth*, L. R., 2 Eq. 692; *Portalis* v. *Tetley*, L. R., 5 Eq. 140; *Fuentes* v. *Montis*, L. R., 4 C. P. 93; *Johnson* v. *Credit Lyonnais Co.*, 3 C. P. D. 32; and the stats. 5 & 6 Vict. c. 39 and 40 & 41 Vict. c. 39.

(*b*) This clause is merely declaratory, as this agreement does not create a partnership. See Bovill's Act (28 & 29 Vict. c. 86), s. 2.

which part shall be payable on the next day of payment as aforesaid.

XXXVI. Employment of Manager.

Commission on surplus net profits.

2. During such term of seven years, whenever, not being less frequently than once in every year, an account of the company's business shall be made up for the purpose of showing the net profit made by it for some then bygone period, and there shall appear according to such account to have been made a net profit in such period over which such account shall extend, exceeding the rate of £——— per cent. per annum on the paid-up capital for the time being, the company shall pay to the said manager, in addition to his said salary, a commission of £——— per cent. on the amount of such net profit beyond the said rate of £——— per cent. per annum on the paid-up capital of the company for the time being.

Determination of engagement on manager's bankruptcy, &c.

3. If the said manager shall at any time before the expiration of the said term of seven years be adjudicated bankrupt, or fraudulently misappropriate any of the assets of the company, or be guilty of any gross default or misconduct in his office, then immediately on the happening of any such event this agreement shall cease and determine, but without prejudice to any right of action or suit which may have accrued; but if in any other case, the company shall, during the said term of seven years remove the said manager from his said office, then the company shall nevertheless pay to him, during the residue of the said term of seven years, or till his earlier decease, the amount of the said salary by equal quarterly payments as aforesaid, and with such proportional part as aforesaid, but not the said commission for any period after such removal; the payment of the said salary in manner aforesaid to be as and for ascertained and liquidated damages for such removal: Provided always that the said manager shall be considered as removed from his said office within the meaning of this clause if the company shall at any time during the said term of seven years be dissolved or wound up, or the business thereof be discontinued, in such manner that the said manager shall thereby cease to be employed in his said office without being appointed in lieu thereof a manager on the same terms of any company to which the business of the said company shall have been transferred, and the time of his so ceasing to be employed shall be considered to be the time of such removal. Provided also that in such case all then future payments of the said salary shall become due and

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payable immediately on the commencement of such winding-up or process of dissolution, or on such discontinuance of the business of the said company as if the said term had expired, and the said manager had lived to the end thereof, and may be sued for and recovered accordingly.

Proportionate allowance in respect of commission in event of manager's death.

4. In the event of the death of the said manager during the said term of seven years, or his removal from his said office without such justification as aforesaid, the company shall pay to his executors or administrators, or to him as the case may be, and in the event of the said manager continuing to be one of such general managers as aforesaid, during all the said term, the company shall pay to him a commission at the rate in the second clause hereinbefore mentioned on such excess, if any, as in the same clause mentioned on the net profit made from the foot of the last account of such profit till the time of such death or removal of the said manager, or to the expiration of the said term, as the case may be; provided that it shall not under that clause be necessary for the company to make out any special account for the purpose of ascertaining the amount of such commission, but that such commission shall be payable at the next time when in the ordinary course of the management of the company, not being less frequently than once in every year, an account of net profit would be made out, and the amount shall be determined by the net profit during the period covered, or which ought to be covered by such act, according to the said ordinary course of management, and in proportion to the length of that part of the same period for which such commission shall be payable.

Conduct of business.

5. The said manager shall diligently and faithfully serve the company, and promote the success thereof to the best of his ability in the office of one of its general managers in London during the said term of seven years, if he shall so long live, devoting his whole time and attention to the business of the company and the duties of the said office, except [as hereinafter provided and] so far as he may be incapacitated by illness from so doing, and except on Sundays, or Good Fridays and Christmas Days, and Bank Holidays, and on Saturdays when there shall be no special exigency to the contrary, and during such reasonable holidays as may from time to time be agreed on between him and the company or the directors thereof.

6. The said manager shall in such service as aforesaid, and

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when not absent as aforesaid, conform himself to all lawful and reasonable directions, whether general or special, as to the conducting by him as one of such managers as aforesaid of the business of the company, which may from time to time be given to him, either by the company or by the directors thereof, and most especially shall not divulge any secret of the company to any person, partnership, or corporation dealing with the company, and he shall duly give directions for proper entries to be made in the books of the company, kept for that purpose, of all money, receipts, payments, dealings, and transactions which shall be given, made, entered into, or authorized by him touching or affecting the company, and shall duly account for all moneys received by him on account of the company, and shall keep or cause to be kept, at the offices of the company or elsewhere, as the directors thereof shall appoint, all correspondence, vouchers, and other documents which may concern the company, and ought in the ordinary course of business to be preserved, and shall at all times afford to the directors and all other members of the company entitled to demand the same, full explanations as far as may be in his power, of any dealings or transactions of or affecting the company.

Manager not to engage in other business.

7. During the said term of seven years, except in case of his removal from his said office without such justification as aforesaid, the said manager shall not carry on or be concerned with any other person or persons in carrying on, or be a director of any company carrying on, or be employed by any person or persons or company carrying on, or except under this agreement be in any way interested in any such trade or business as the company shall for the time being be carrying on; provided that nothing in the present clause contained shall be construed so as to restrict the previous provision for the devotion of his whole time and attention by the said manager to the business of the company [*or*, be construed so as to apply to any interest or connection of the said manager as capitalist or accountant, but not as a partner in or with the firm or house of ———, or the person or persons constituting that firm or house from time to time].

Company to furnish manager with account of profits.

8. The company shall at least once in every of the said seven years, or within six weeks from the end of each such year, make out a true and just account so as to show what profit has been made by it, and shall make out the first of

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such accounts for a period commencing with the said ——— day of ——— last past, and every subsequent account for a period commencing at the end of the period for which the last preceding account shall have been made out.

Copy of account signed by manager to be conclusive.

9. A copy of every annual account shall be furnished to the manager, and shall, unless he shall have given notice in writing to the secretary of the company of his intention to object to the same, be signed by him within ——— days after the taking of such accounts; and the account so signed shall be deemed to be finally settled and to be conclusively binding on the manager and all persons claiming under him, except that if and whenever any manifest error shall be found therein, within six calendar months after its being so signed, such error shall be ratified (*a*).

As WITNESS, &c. (*b*).

XXXVII. *AGREEMENT to pay for* GOODS *to be* FURNISHED *to a* THIRD PERSON (*c*).

Parties.

AGREED this ——— day of ———, BETWEEN A. B., of &c., of the one part, and C. D. and E. F., both of &c.,

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(*a*) If an arbitration clause is desired, the form given *ante*, p. 561, clause 24, may easily be adapted.

(*b*) As to signature of contracts on behalf of a company, see *ante*, p. 309.

(*c*) An agreement of this nature is required to be in writing: *ante*, p. 302. An undertaking to pay for goods furnished to, or money paid on behalf of an infant, is original, not collateral, for the infant cannot be liable, and there is no privity between the infant and the person who furnished the goods, or paid the money: *Harris* v. *Huntback*, 1 Burr. 373. An agreement of this kind is often contained in a letter, and may then be expressed as follows:

[" *Date.*]

" Gentlemen,—In consideration of your agreeing to supply my son, A. B., with goods on credit, on my guarantee hereinafter contained, I hereby undertake to be answerable for the current balance, which shall or may at any time be due from him to you on account of such goods, not exceeding the sum of £———: and this guarantee shall not be affected by the death or retirement of any member of your firm, or the addition of any partner or partners thereto, but shall extend

warehousemen, trading under the firm of D. & Co., of the other part, as follows :—

XXXVII. Guarantee of Payment for Goods to be Supplied to Third Person.

WHEREAS the said A. B. has requested C. D. and E. F., trading under the style or firm of D. & Co., to supply G. H. (a relative of the said A. B.), with goods on credit, which he has consented to do on A. B. entering into the agreement hereinafter contained. NOW THEREFORE, in consideration of the premises, A. B. hereby undertakes and agrees with C. D. and E. F., to pay unto C. D. and E. F., or their successors in the said firm, all and every such sum and sums of money, as shall from time to time be due from G. H. to the said firm, for goods sold and delivered unto, or on the account, or for the use of G. H., not exceeding on the whole the sum of £———: PROVIDED nevertheless, that this guarantee shall not be considered as satisfied in the whole or in part by the payment by G. H. of any sum or sums of money, on account of goods to be supplied to him as aforesaid, but shall continue and extend to cover the balance for the time being due from the said G. H. to the said firm on the account aforesaid, not exceeding the amount hereinbefore mentioned (*d*).

AS WITNESS, &c.

XXXVIII. *AGREEMENT between the Lessees of Docks and a Dock Company, for a* GUARANTEE FUND *for securing the due* PERFORMANCE *by the Lessees of the Terms of the* LEASE.

AN AGREEMENT made the ——— day of ———, 18—, BETWEEN [*lessee*], of &c., and [*lessee*], of &c. (hereinafter referred to as the lessees), of the one part, and the ——— Dock Company, a company incorporated &c. (and who are hereinafter referred to as the company), of the other part. WITNESSETH, and it is hereby agreed and declared between and by the parties hereto as follows, that is to say :—

1. The lands mentioned in the first schedule and plan hereunto annexed, are lands to which the lessees respectively

Unpaid balance of purchase-

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to the goods supplied by the firm so altered; nor shall this guarantee prevent my said son from being liable to pay for any goods so furnished to him as aforesaid. I am, &c."

[*Signature.*]

(*d*) See *Ellis* v. *Emmanuel*, 1 Ex. D. 157.

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are beneficially entitled in fee simple (subject, as to part of the same lands, to incumbrances or equitable interests affecting the entirety thereof respectively, as particularly mentioned in the said schedule), except that in respect of certain parts of the said lands, for the purchase of which the said lessees or some or one of them have contracted with the company, there remains unpaid a balance of purchase-money which is to be provided by the lessees out of their own moneys.

money of lands to be provided for.

Deeds deposited by lessees to be produced on request.

2. Such of the deeds and documents relating to the title to the said lands as are in their possession have been deposited by the lessees with A. B. and C. D., the vice-chairman and secretary respectively of the company, as trustees for the company, as a security affecting the shares and interests of the lessees in the said lands, and upon the terms hereinafter referred to; and the same are to be by them deposited and kept in their names at the banking-house of Messrs. ——— and Co.: PROVIDED ALWAYS that the said trustees shall at all times produce the same without charge on the request in writing of the lessees and each of them, or the solicitors of them and each of them.

Deposit of securities by lessees.

3. The several sums of stock and shares mentioned in the second schedule hereto annexed, have been duly transferred to and now stand in the names of the said A. B. and C. D., as trustees for the company, and such transfer has been made as a security upon the terms hereinafter referred to.

Estimated value of guarantee fund.

4. For the purposes of the present arrangement only, a price has been set against each of the several particulars included in the first and second schedules respectively, being the value thereof according to an estimate made by or on behalf of the company for the purposes of security, whereby the aggregate value at the prices aforesaid of the lands mentioned in the first schedule beyond the amount of the incumbrances affecting the same, and of the entirety of the stocks and shares mentioned in the second schedule is estimated to be the sum of £———, for which amount as part of the guarantee fund of £——— agreed to be provided by the lessees, the said scheduled lands, stocks and shares are (subject to the provisions hereinafter contained), to be deemed as given to and accepted by the company as a security in part satisfaction of the agreement aforesaid.

Lessees to make out and deliver title.

5. The lessees will forthwith, at their own expense, furnish the company with abstracts of title, and deduce such title

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to all the lands mentioned in the first schedule, as was accepted by them on the occasion of the purchase thereof, subject as hereinbefore is mentioned, and will at the like expense whenever required by the company procure the entire fee simple in possession of the said lands, free from all equities and incumbrances, except the mortgages mentioned in the said first schedule, either at one time or at several times to be well and effectually vested in the said A. B. and C. D., or some other trustees to be nominated by the company in this behalf.

On default, lessees to give other sufficient securities.

6. In case the lessees shall fail or neglect to deliver within the space of six calendar months next after the date of this agreement such a title as, although not strictly marketable, may without prejudicing the sale of the lands be saleable under reasonable protective conditions of sale, the lessees will upon the request of the company at any time thereafter provide and duly vest in trustees for the company other sufficient securities (the sufficiency to be determined by arbitration in the event of difference) to the full value of the lands to which they shall fail to make a title as aforesaid, according to the price set opposite the same in the said schedule, and when such other securities shall have been duly provided as aforesaid, and not previously, the lands in substitution for which the same shall have been provided shall be released from the security intended to be arranged for by this present memorandum.

Trust deeds to be made and executed of guarantee fund.

7. Proper deeds shall be made and executed declaring trusts and making provisions for expressing and giving effect to the security herein arranged or agreed upon, with respect both to the lands mentioned in the first schedule, and to the stocks and shares mentioned in the second schedule: such deeds shall either be the same as those by which the said lands or any part thereof shall be vested in trustees for the company or contemporaneous, or such or other deeds as the company may be advised or require.

Powers, &c. to be contained in trust deeds;

for company to sell on default of lessees in payment of rent, &c.;

8. Such deeds respectively shall contain all necessary, proper, and complete provisions for giving effect to the guarantee or indemnity hereby expressed and intended to be provided, and for enabling the company (after default by the lessees in payment of the rent or performance of their covenants in the lease), in their unqualified and uncontrolled discretion, to sell, at such time or times, and in such manner, as may by the company be deemed advisable, the said lands,

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and stocks, and shares, or any part thereof respectively, and to lay out with roads, sewers, and otherwise to let, or sell, the same lands in plots or otherwise, for building or other purposes; and for insuring such buildings against fire, and for granting and retaining easements over the same or any part thereof, and generally for managing, cultivating, and disposing of the same lands to advantage; And also for settling and adjusting the claims and interests of incumbrancers on the said lands; and also as well before as after default (but if before default only with the assent of the lessees), for mortgaging the whole or any part of the premises, for the purpose of meeting, or taking up or consolidating or settling any of the existing mortgages on the said lands according to the said schedule; And also a covenant by the lessees for providing persons willing to accept transfers of such mortgages in the event of the same or any of them being called in, and a power enabling the company and the said trustees to redeem such mortgages, or any of them; And also a covenant by the lessees to repair, amend, and uphold the premises comprised in the security, and for enabling the company to do the same in case of default by the lessees, and to be repaid for all outlay by exercise of the power of the indemnity deed; And in the said deed shall also be contained a power enabling such one or more of them the lessees as subject to this memorandum is or are beneficially entitled to the said lands at any time before such default as aforesaid, to lease the said lands or any part thereof: Provided always that no such lease be made without the previous assent of the company, except upon the terms of reserving a rent equal to at least 5*l.* per cent. upon the valuation price according to the schedule, with a sum equivalent to 33*l.* per cent. added thereto; but every lease granted under this provision shall be in such form that the rent and covenants shall be incident to the immediate legal reversion of the premises so leased; And there shall also be contained a provision that the said company and the said trustees will at any time or times, until such default as aforesaid, concur with the said lessees in any sale of the said lands or any part thereof: Provided no sale be made at a less price than the valuation price according to the schedule, with an addition of 33*l.* per cent. thereto, and provided that the valuation price and one-third of any excess of such purchase-money beyond

powers for company to sell, &c.;

powers for lessees to grant leases;

proviso as to such leases;

as to sales of lands;

proviso as to price;

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that price shall be retained by the company as part of the guarantee fund, and the remaining two-thirds shall be paid over to the lessees; and a provision entitling the lessees at any time before default as aforesaid to a release from this security of all lands remaining comprised therein, when and so soon as the net sum of £———, or any equivalent of that sum in the lands mentioned in the said first schedule, or in said lands substituted for them under the provision hereinbefore contained, upon which ground rents shall be secured, calculating such ground rents at twenty years' purchase, shall have been received on behalf of the company by means of sales of land or on payment of the difference between the amount so realized and £———: PROVIDED that no such lands, upon which ground rents shall be so secured, shall be required to be accepted by the company as an equivalent, unless the lease reserving such rent shall contain all usual stipulations and be for a term of not less than sixty years from the making thereof, and unless such ground rents be well secured, and any difference between the lessees and the company as to the same being well secured, shall be settled by arbitration; AND there shall also be contained in the said deed a provision entitling the lessees at any time, until default, to withdraw from the security the whole or any part of the said lands, or the whole or any part of the stocks or shares for the time being comprised therein, on payment in money to the said trustees of the security of the price or sum of £——— in the event of a release of the whole of the land; or in the event of the withdrawal of a portion of the land on payment of the value of such portion as defined in the first schedule, with an addition of 33*l.* per cent.; or in the event of the release of any of the stocks or shares, on payment of the value thereof according to the second schedule hereto, or on the substitution by conveyance or transfer to the trustees of other securities of adequate value, any difference as to such value being settled by arbitration; AND also a provision that in the event of any of the said stocks or shares falling according to the price current for the time being below the sums at which they are respectively valued in the schedule, the said lessees will immediately, on the request of the company, substitute other securities equal in value according to the said schedule to the stocks or shares for which they shall be substituted, or make up the deficit by

proviso as to ground rents;

power for lessees to withdraw lands from the security, on payment;

substitution of other securities in case of depreciation;

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adding other securities of adequate value, any difference or dispute as to value being settled by arbitration; and this provision shall apply from time to time as well to original securities as to securities substituted under the operation of this provision; And there shall also be contained in the said deed provisions for the investment of the guarantee fund for the time being until default on real security in England or Wales, or upon the guaranteed or preference shares, or debentures of any incorporated company paying a dividend, or upon such said adequate securities as the said company and the said lessees may from time to time agree upon, or as shall be determined by arbitration in the event of difference; and also a provision for the charge of such investments upon the terms aforesaid; And also a provision entitling the lessees to receive the net annual income of the investments of the land until the company shall have a right to resort to the fund for the purposes of indemnity; and also a provision for arbitration in the event of any difference between the parties hereto as to the form of the deed or deeds to be executed in pursuance of this memorandum, or as to the provisions, costs, clauses, and conditions to be contained therein, such difference shall be settled by ———, Esq., or in the event of his dying or declining to act, then by such conveyancer being at the bar, and of not less than fifteen years' standing, as shall be named by her Majesty's Attorney-General for the time being.

investment of guarantee fund;

application of income;

arbitration.

9. All costs and expenses as between solicitor and client in relation to the deposit and transfers and this agreement, and to the carrying into effect the stipulations, acts, matters, and things herein contemplated, shall be borne and paid by the lessees, and any property for the time being comprised in the security shall be charged and chargeable therewith.

As witness, &c.

The First Schedule above Referred to.

The Second Schedule above Referred to.

XXXIX. *AGREEMENT for a* LOAN (*a*).

AN AGREEMENT made the ——— day of ———, 18—, BETWEEN [*borrower*], of &c. (hereinafter called the borrower), of the one part, and the ——— Assurance Society (hereinafter called the lenders), of the other part. WHEREAS the borrower is absolutely entitled in fee simple in possession to certain freehold and copyhold houses, lands, and premises more particularly described in the schedule hereto annexed, the estimated value of each separate property being also therein stated; AND WHEREAS such properties are subject to various family and other charges; AND WHEREAS the said ——— is desirous of paying off such charges, and for such purpose and his other occasion has applied to the lenders to lend him (through their trustees) the sum of £———, upon the security of an absolute mortgage or mortgages of the said properties respectively, which the lenders have consented to do on the following conditions. NOW THESE PRESENTS WITNESS and it is hereby agreed as follows:—

Parties.

Recitals of seisin of borrower;

subject to charges; of application for loan.

1. The society shall, subject as hereinafter mentioned, advance the sum of £——— on mortgage at £——— per cent. interest, payable half-yearly, with a proviso for reduction to £——— per cent. on payment within ——— month of the respective payments becoming due. The advance to be for a term of not less than —— years, provided the interest shall be regularly paid as aforesaid and upon the security aforesaid.

Agreement for advance.

2. The mortgage shall contain covenants by the borrower for payment of the principal money and interest, and such other covenants, powers and provisions as the lenders shall reasonably require for effectually securing the repayment of the same respectively. The mortgage shall also contain a covenant on the part of the borrower to insure and keep insured all buildings in the ——— Fire Office, but the present policies are to be allowed to run out.

Insurance.

3. The estimated selling value of the property shall be ascertained, and reported on by a competent surveyor to be appointed on behalf of the said society, at the expense of the borrower, and the advance shall be made only in the event of such surveyor reporting that the aggregate selling value of

Valuation of security.

(*a*) Other agreements for loans will be found in a subsequent volume of this work, sub. tit. MORTGAGES. This agreement not being accompanied by a deposit of deeds only requires a 6*d.* stamp. See stat. 33 & 34 Vict. c. 97, s. 105, and schedule.

Stamp.

XXXIX. Agreement for a Loan.

the property is at least the amount so estimated as aforesaid by the borrower, that is to say, £———. PROVIDED that in the event of the surveyor reporting that the property is not worth the estimated value aforesaid, the charges of the said surveyor to be paid by the borrower shall not exceed the sum of £———; and in the event of the report being favourable, and the advance being completed, the charges of the said surveyor shall not exceed the sum of £———.

Delivery of abstracts.

4. The borrower shall forthwith deliver to the solicitor of the said society abstracts of title to the several properties, and shall produce evidence of the same to the satisfaction of the counsel of the lenders.

Expenses of investigation of title.

5. The expenses of and preparatory to this agreement, and of such examination and verification, together with counsel's fees and incidental expenses, shall be borne by the borrower, together with the costs of the mortgage or mortgages, and shall be deducted from the amount to be advanced.

Costs, in case loan should not be made, or required.

6. In the event of the report of the surveyor not being favourable, or if from any other cause whatever, not being the wilful default of the lenders, the advance should not be made or required, the borrower will pay to the said society all the reasonable costs and expenses of their solicitor in reference thereto to the date of the negotiations being completely broken off.

AS WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XL. *AGREEMENT for the* MANUFACTURE *of* SALT.

AN AGREEMENT made the ——— day of ———, 18—,

Parties.

BETWEEN [*owner*], of &c. (hereinafter called the owner), of the one part, and [*manufacturers*], of &c. (hereinafter called the manufacturers), of the other part.

Recitals.

WHEREAS the owner is possessed of certain salt works, situate at ———, in the county of ———, for the residue of a certain term of years therein granted to the owner, by a lease dated &c., and made &c., of which term ——— years were unexpired on the ——— day of ———

XL. Manufacture of Salt.

last, and the owner is also entitled to the plant, implements, and utensils belonging to, and used in and about the said salt works, for the manufacture of salt; AND WHEREAS the said parties hereto have agreed that the manufacturers shall manufacture salt at the said salt works, upon the terms and conditions hereafter mentioned. NOW THESE PRESENTS WITNESS and the owner and manufacturers hereby mutually agree as follows, that is to say:—

Interpretation clause.

1. In these presents the term "the owner" includes the said owner and his executors, administrators, and assigns, and the term "the manufacturers," includes the said manufacturers, and the survivors and survivor of them, and the executors or administrators of such survivors, their or his assigns.

Agreement to conduct the manufacture.

2. The manufacturers shall and will manufacture salt or cause salt to be manufactured at the said works, for and on behalf of the owner, during the remainder of the said term of the owner in the said works, and shall not nor will manufacture salt at the said works for or on behalf of themselves or any other person or persons than the owner.

Owner to deliver brine

3. The owner shall at his cost deliver the necessary supply of brine into the pans of the said works, and that such brine shall not be less than thirty-eight degrees strong, to be tested by ———'s hydrometer; and that if any brine so delivered shall be below such strength, the salt to be manufactured therefrom shall be paid for at such an advanced rate as will compensate for the additional cost of the manufacture thereof, and such additional cost in case of difference shall be determined by [*referee*], of &c., and [*referee*], of &c., or by an umpire to be named by the said referees.

Manufacturers to deliver salt into barges, &c.;

4. The manufacturers shall and will except and so far as they shall be prevented or hindered by frost or any other cause not under their control, manufacture and deliver into barges or carts to be supplied at the works for that purpose, by and at the cost of the owner, salt, at the rate of 4,160 tons per annum, and shall and will so manufacture and deliver the same after the rate of eighty tons per week.

to be supplied by owner.

5. The owner shall and will take and remove the salt which shall be manufactured in pursuance of this contract, at least to the extent in quantity or weight mentioned in the last article, and shall and will supply weekly at the said works, the necessary barges or carts for removing the weekly quantity

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in the said last article agreed to be delivered and supplied weekly, and remove the same accordingly.

Commencement of term.

6. The time for the commencement of the manufacture of salt under this contract shall be the ——— day of ———, 18—.

Payment.

7. The owner shall pay the manufacturers for the salt so manufactured or supplied by them at such prices, and with and subject to such variations, at such times, and in such manner as hereinbefore mentioned, that is to say:—The price for the manufacture and delivery of salt to be manufactured and supplied under this agreement shall be at and after the rate of 9*s.* 6*d.* per ton, on the supposition that coal and rough coal slack will be 9*s.* per ton, short weight as delivered; and the price to be paid for the salt to be manufactured and supplied as aforesaid shall also be considered as based on the supposition that the rate of wages for labour in such manufacture and supply is 1*s.* 9*d.* per ton, and any increase or decrease in the rate of wages, as the case may be, shall be added to or deducted from the price for such manufacture or supply to an extent not exceeding 3*d.* per ton either way: And at the expiration of three calendar months, to be computed from the ——— day of ———, 18—, next, and at the expiration of every three calendar months during the subsistence of this contract, the owner or administrators shall pay to the manufacturers the price of the salt which shall have been manufactured or supplied under this contract during the three calendar months immediately preceding: And the said manufacturers shall be at liberty during the current three calendar months, for the time being, to draw upon the owner for the weekly sum of 10*l.* sterling on account of the current expenditure, and that the said owner shall answer such drafts accordingly, and be allowed the amount of the drafts he or they shall so answer in account at the expiration of the current three calendar months: And the manufacturers shall accept payment of the amount, which after such allowance they or he shall be entitled to receive under this contract, at the expiration of every or any three calendar months by bills of exchange, payable three months after date, to be drawn upon and accepted by the owner.

Weekly drawings.

Owner to pay

8. The rent payable under the said lease of the said

works, and all rates and taxes payable in respect of the works shall be paid and discharged by the owner. XL. Manufacture of Salt.

9. The manufacturers shall at their own costs erect fresh chimneys on the works for the manufacture of salt, hereby agreed to be supplied, and set the pans belonging to the said works with the patent fireplaces of ——— & Co., and make any alteration which may be required by them or him for the purposes of this contract. rent under lease. Manufacturers to execute necessary alterations in premises;

10. The manufacturers shall at their own costs, during the term of this contract, keep the pans, flues, and fireplaces, and all the plant, implements, and utensils used in the works, and belonging to the owner, in an efficient state of repair, and deliver up the same to the owner at the termination of the said term in a good and substantial state of repair, and, moreover, shall at his or their own costs, if required by the owner, remove the said patent fireplaces, or any of them, and reset the pans with fireplaces upon the old system. to keep plant, &c. in repair.

11. The owner shall, during the term of this contract, at his or their costs, make and do all repairs to the said salt works which in the like premises come under the denomination of landlord's repairs. Owner to do landlord's repairs.

12. If any dispute or difference shall arise between the parties hereto relating to the construction of these presents, or to any matter or thing herein contained, such dispute or difference, except as is or are hereinbefore otherwise specially provided for, shall be settled by two referees, one to be chosen by the owner, and the other by the manufacturers, and if such two referees should not agree, then by an umpire, to be chosen by them. Settlement of disputes.

As witness, &c.

XLI. *AGREEMENT to permit the Enjoyment of* Light *on Sufferance.*

AN AGREEMENT made the ——— day of ———, 18—, Between A. B., of &c., of the one part, and C. D., of the other part. Whereas the said A. B. has lately put out ——— windows or lights from his shop and premises in ——— street, in the city of ———, which face into or overlook the back yard or grounds of a dwelling-house or tenement, whereof the said C. D. is now possessed in fee simple.

XLI. To permit Enjoyment of Light.

Now, the said A. B. hereby admits and declares that the said lights or windows hereinbefore mentioned are put out and remain upon the leave or indulgence of the said C. D.: And the said A. B., in consideration of the said leave or indulgence hereby agrees with the said C. D. that he the said A. B., his heirs [*or* executors, administrators] or assigns, will upon the request in writing of the said C. D., his heirs or assigns, to be made at any time hereafter, wall or block up the same: [And further, that until such windows or lights shall have been so walled or blocked up, he the said A. B., his heirs [*or* executors, administrators] or assigns, will pay to the said C. D., his heirs or assigns, the yearly sum of £———, payable half-yearly, on the ——— day of ———, and the ——— day of ———, the first payment to be made on the ——— day of ——— next.]

In witness, &c. (*a*).

XLII. *AGREEMENT to permit the Continuance of Obstruction to Ancient* Lights.

Parties.

Recital of having ancient lights, and obstruction by buildings.

AN AGREEMENT made the ——— day of ———, 18—, Between A. B., of &c., of the one part, and C. D., of &c., of the other part. Whereas there are two ancient window lights on the south side of the dwelling-house of the said A. B., situate at ——— aforesaid, and which window lights have been totally obstructed by a dwelling-house and premises which the said C. D. hath lately erected upon his

(*a*) It is generally advisable, though not absolutely necessary, that a document of this nature should be under seal, so as to bind the heirs and real estate, as well as the executors and administrators and personal estate of the dominant owner, *i. e.*, the owner of the windows. See the Conveyancing Act, 1881, s. 59. If a rent is reserved, it will be stamped as an agreement for a lease. See tit. Leases. This precedent is adapted from the document which, in the case of *Bewley* v. *Atkinson*, 13 Ch. D. 283, was held to be effectual to prevent the dominant owner from acquiring any right to the access and use of light by prescription under sect. 3 of the Prescription Act (2 & 3 Will. 4, c. 71). The agreement will be valid if signed by the dominant owner only; but it is advisable that the agreement be executed in duplicate by both parties, so as to insure, as far as possible, its coming to the notice of the successors in title of the dominant owner.

lands adjoining thereto; AND WHEREAS it has been agreed between the said A. B. and C. D., for the purpose of preventing disputes between the owners and occupiers of the said two dwelling-houses, to enter into the agreement following. NOW THESE PRESENTS WITNESS as follows, that is to say, first, that the said C. D. on his part admits that the said A. B. was well entitled to the said window lights; And, secondly, that in consideration of the said admission and declaration by the said C. D., and in further consideration of the sum of £———, paid by the said C. D. to the said A. B. (the receipt whereof the said A. B. hereby acknowledges), the said A. B. on his part agrees that the said window lights shall and may for ever remain obstructed as before mentioned: AND he hereby releases the said C. D., his heirs and assigns, from All actions, suits, claims and demands whatsoever, on account thereof.

XLII. To permit Obstruction to Ancient Lights.

To prevent disputes, admission of right to lights, and agreement to allow obstruction. Release of all actions, &c.

IN WITNESS, &c. (*b*).

XLIII. *AGREEMENT for the* CONSTRUCTION *of a* RAILWAY STATION *and* LINE.

THIS INDENTURE of Contract made the ——— day of ———, 18—, BETWEEN A. B. and C. D. carrying on business as builders and contractors, under the name or firm of ——— and Company, at ———, in the county of ——— (who are hereinafter referred to as the contractors), of the one part, and the ——— Railway Company, incorporated by an Act of Parliament passed in the ——— and ——— years of the reign of her Majesty Queen Victoria, intituled "The ——— Railway Act, 18—," (and who are hereinafter referred to as the company), of the other part. WHEREAS the company, acting under the authorities vested in them by "The ——— Railway Act, 18—," and by certain public Acts incorporated therewith, are authorized to make and maintain, and contemplate making and maintaining the following railways, with all proper stations, approaches, works, and conveniences connected therewith, respectively, that is to say:—

Parties.

Recitals: of intention of company to make station, lines, &c.

1. A railway (hereinafter called railway No. 1) commencing at or near X., and terminating at or near Y.

(*b*) See note (*a*), p. 578.

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2. A railway (hereinafter called railway No. 2), &c.

And particularly a new terminal station; And whereas the contract intended to be effected by these presents comprises the construction and maintenance for a period of one year after completion of the railways and works authorized by the ——— Railway Act, 18—, and hereinbefore mentioned, or such number or parts of the said railways and works as the engineer of the company may from time to time determine to have executed under this contract, and under the powers of the said Act, and the same contract also comprises such other or additional works as may be required by the said engineer, to complete for public use the railways and works hereinbefore mentioned, or such number or parts thereof as the said engineer may determine to have executed under this contract, and to carry into effect any agreements with landowners and others, which the company has entered into, or may hereafter enter into, as well as the various clauses and provisions of the said Act; And whereas the principal general features of the works are, or will be, stated in the specifications hereunder written and in subsequent specifications, and also in the drawings and instructions to be issued by the engineer from time to time; And whereas the contractors have proposed to the company to execute the aforesaid works, matters, and things upon the terms and conditions hereinafter mentioned, and the company having accepted such proposal, the parties hereto have agreed to enter into these presents for that purpose accordingly; NOW THIS INDENTURE WITNESSETH that in consideration of the payments to be made in cash or otherwise as hereinafter provided for, and of the covenants hereinafter contained on the part of the company, the contractors hereby do jointly and as separate covenants each of them doth covenant and agree with the said company in manner following, viz.: That they, the contractors, shall and will in a good and workmanlike manner, to the entire satisfaction of the company's engineer, construct, execute, complete, and maintain the railways, works, matters, and things hereinbefore mentioned, and also described or mentioned or to be described or mentioned in the said specifications and plans hereinbefore referred to, and shall and will duly execute and construct, complete, and maintain all the works, and find and provide all the plant, materials, labour, matter, and things of and relating to the said intended railways and works, in the

of general scope of this agreement;

that intended works are stated in specifications;

that contractors have proposed to execute the works.

Agreement.

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manner, within the time, and subject to the terms and conditions, and for the considerations hereafter expressed, that is to say:—

Contractors to execute works and provide plant, &c.

1. The contractors shall execute, construct, complete, and maintain all the works, and find and provide all the plant, materials, labour, matters, and things comprised in this contract, and in accordance with the terms, conditions, stipulations, and provisions of these presents, and of the specifications hereunder written, or of any drawings, instructions, or subsequent specifications to be issued by the engineer from time to time, and for the considerations expressed and set forth in these presents and in the schedule of prices hereunder written; And all plant, materials, matters, and things used or procured by the contractors for the purpose of this contract, and brought or left upon or near to the site of the said works, shall become and be considered as the property of the company for the purposes of the said works and undertaking, and shall not be removed, taken away, disposed of, or returned, to the contractors, unless with the consent in writing of the engineer; but the company shall not be answerable for any loss or damage thereto.

Contractors, with consent of engineer, may avail themselves of statutory powers of company.

2. The contractors shall, in the execution of the works, be allowed to avail themselves of the company's Acts of Parliament, as far as they are applicable to the due and proper execution of the works: But, in all cases, the contractors shall previously apply for and receive the sanction in writing of the engineer, and shall obtain from the company all necessary and proper notices for the execution of any such powers.

As to lands required for execution of works, &c.

3. The land required for the site of the works shall be provided by the company, but the contractors shall, at their own cost, provide all the land required for temporary purposes, or for depositing the materials excavated from the foundations and site of the works; and, in order to obtain this, they may, at their own cost, use the powers of the company's Acts of Parliament; but the situation of the land required for such purposes must be to the entire satisfaction of the engineer.

Contractors to arrange with owners of property, &c. and indemnify company from claims.

4. The contractor shall also make definite arrangements with the owners of property in respect of all land or property taken, used, or entered upon, for any temporary purposes, and shall pay all damages, compensation, and purchase or other money that may become payable in respect

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thereof, or in respect of trespass; and subject, as hereinafter is mentioned, in respect of injury to adjoining or contiguous properties, or in respect of the use for such temporary purposes as aforesaid of the company's Acts of Parliament; and shall indemnify the company therefrom, and from all claims and demands on account thereof; and if the company shall be called upon to pay any such moneys, the sums so paid, or which the company shall be liable to pay, shall be charged to the contractors, as so much money paid to or on account of the contractors.

Contractors not to remove sand, &c.

5. The contractors shall not sell, or otherwise dispose of, or remove, except for the purposes of this contract, or in the manner hereafter provided for, any sand, clay, soil, or other materials of any kind or description whatsoever, which may be obtained from the excavations or embankments, or from any lands in the possession of the company.

Contractors to pay for all buildings, &c. removed for purposes of the works;

6. All buildings, erections, works, materials, trees, timber, and other produce now upon the site of the works shall be the property of the company; and as many of them as it may be necessary to take down and remove for the execution of the works, shall be taken down and removed from the works and property of the company by the contractors, and they shall take the same as their property, and shall pay or allow to the company for the same such sum of money as shall be decided by valuation to be the value thereof, after taking into account the costs and expenses to the contractors of pulling down and removing the same; or, in case of difference, as shall be determined by arbitration in manner hereinafter provided.

to keep clear passage of roads, &c.

7. The contractors shall at all times during the term of this contract keep free from obstruction the passage of streets, roads, public footpaths, canals, rivers, and other communications.

to be responsible for all damage, &c. caused by works;

8. The contractors shall guarantee the stability of every part of the works they execute, and shall be responsible for any damage or inconvenience that may arise to the public authorities, or to the owners or occupiers of land, or any other parties whose interests may be affected by reason of any of the works herein contracted for, while in progress, and for twelve months after their satisfactory completion, or by reason of delays in the commencement of or completion of such works.

to observe statutory pro-

9. The contractors shall in all cases strictly adhere to and

observe and perform all and singular the clauses, stipulations, and provisions in any present or future Act of Parliament relating to the railways or affecting the execution of the works hereby contracted for, or to any agreement that the company has entered or may hereafter enter into with landowners or others, whose interests may be affected by the works, so far as relates to such execution; and the contractors shall be responsible for all claims to be made upon or against the company, arising out of or owing to any infringement or neglect of or non-compliance with such conditions, clauses, stipulations, provisions, or agreements, and in case of the contractors refusing or neglecting to pay or to satisfy such claims, the engineer shall have full power to direct the company to pay or satisfy such claims, and to charge the amount thereof and all costs, charges, and expenses attending the same to the contractors, as so much money paid to them on account of their contract.

visions in construction of the works;

10. The contractors shall also be liable for, and shall make good any damage or injury to streets and roads, whether public or private, and to contiguous or adjoining lands, buildings, or property, and to sewers, drains, culverts, water and gas mains, pipes, telegraphs, &c., occasioned by the acts or defaults of themselves, their agents, servants, or workmen, or from any cause whatever contingent upon the execution of their works done or omitted by themselves for their own purposes as contractors, and shall take upon themselves any liability of the company to compensate owners and occupiers of buildings and land for temporary damage, and shall pay the costs of all suits and trials which may arise from these causes; But this shall not include any compensation which in the ordinary course will be payable by the company for the injuries affecting lands, buildings, or other property, such as the interference with light, water, &c., not occasioned by the acts or defaults of the contractors, or their agents or servants, as such contractors.

to make good damage to interests of adjoining parties.

11. And it is expressly declared that no addition to the prices set forth in the schedule of prices shall be made in consequence of any increase that may be made in the temporary works which may be considered requisite during the progress of the works, whether for the better or more convenient execution thereof, or for preventing damage or accidents; that if in the execution of the permanent works it shall

Schedule of prices.

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appear expedient to the engineer to omit any of them or to add any others to them, or to make any additions to or deductions from, or alteration in them, or the depths, dimensions, or sizes specified, or any alteration in the materials specified, such alteration and changes, if authorized in writing by the engineer, but not otherwise, shall be made by the contractors, subject as herein mentioned; but such additions, deductions, or alteration shall not render void or in any respect vitiate this contract.

Maintenance of temporary fences, &c. during progress of works.

12. All boarding, temporary fences, boards, gates, and other provisions for the prevention of trespass and injury while the works are in progress shall be made to the satisfaction of the engineer by the contractors, who shall likewise be responsible for all damage caused by the want of such precautions; the contractors shall also maintain all such watchmen, lights, and other precautions as may be deemed necessary and expedient by the engineer or the local authorities, for the security of life and property, and for the convenience and safety of the works; and it is hereby expressly agreed that in all cases where claims are made for damages done by the contractors, or their servants or workmen in carrying this contract into execution, and for which claims the contractors will be liable as between themselves and the company under the provisions hereinbefore contained, and the contractors do not forthwith discharge the same, the engineer may, when such claims appear to him to be reasonable, direct the company to pay the same on account of the contractors.

Maintenance of permanent fencing.

13. The contractors shall also maintain the permanent fencing of every kind in good order, and shall prevent trespass on, to, or between lands adjacent to the works during the progress of the works, and for one year after the same are completed, and shall make good any loss or damage that may arise in consequence of their not so doing.

Statement of proposed arrangements to be submitted to engineer.

14. The contractors shall, if required, furnish the engineer with a statement of the arrangement they propose to adopt for the execution of this contract, and if the engineer shall consider any alteration in the same desirable, the contractors shall be bound to conform thereto.

Police.

15. The contractors shall, at the cost of the company, provide suitable policemen when it may be so ordered by the public authorities or if and whenever directed by the engineer

so to do, for the protection of their own property, or that of the adjacent inhabitants, or the public interest.

16. The contractors shall, at their own expense, erect such temporary cottages and conveniences, to be approved by the engineer, as may be necessary for the accommodation of the workmen and their families during the execution of the works, and shall also provide such offices as may be directed by the engineer for the use of the engineers or inspectors of the lines; and at the termination of their contract, or at such times as the engineer may think fit, they shall take down and remove from the works or the adjacent property such cottages or offices, the materials to be the property of the contractors.

Workmen's cottages.

17. The dimensions of the brickwork, masonry, wrought and cast-iron work, wood-work, and other works of every description, shall be marked upon the drawings; the lengths and levels of the ground, depths of foundation, thickness, size and dimensions of the works shall be also shown upon the drawings, and the contractors in the execution of the works, unless they have written instructions from the engineer to do so, shall not exceed the depths and dimensions shown therein, and should they do so, they shall not be paid for any increased quantity of work that may be caused thereby.

Drawings to show dimensions of works.

18. In case of any discrepancy in the drawings between the figured dimensions and the measurement taken from the respective scales, the former shall, unless in obvious cases of clerical error, in all cases be considered as correct and binding upon the contractors; also the drawings to larger scales shall be taken as more correct than those to smaller scales, and the contractors shall work to such detailed drawings or instructions as may from time to time be given them by the engineer.

As to discrepancies in drawings.

19. The centre lines of the railways, and the extent of land bought or to be bought by the company, has been or will be stated where possible; but the company shall not be responsible for the accuracy thereof, nor shall they be responsible for the plans showing the surface of the ground. The contractors shall set out the works in conformity with the provisions of this contract and the Act of Parliament authorizing their formation.

Company not to be responsible for accuracy of statements or plans.

20. The whole of the works herein contracted for shall be executed precisely as shall be shown upon the drawings, and described in the specifications hereafter mentioned, and in any

Deviations from plans and specifications not to be

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subsequent specifications or instructions which may be given from time to time to the contractors, and shall not in any case be altered or deviated from without the authority in writing from the engineer.

made without engineer's consent.

21. The contractors shall not absent themselves from the works without having a fully authenticated and competent agent to act in their stead, nor assign or sublet the whole or any part of the works herein contracted for without the previous sanction in writing of the engineer, and no sub-contract or assignment of the said contractors shall exonerate the contractors from their liability for the due performance of the contract.

Contractors to provide agent and not to assign, &c. contract without consent.

Contractors to provide plant, materials, &c.

22. The contractors shall at their own expense provide the whole of the materials of every description (except those hereinafter specified to be provided by the company), together with all the machinery, plant, engines, pumps, scaffolding, centre-tools, and implements of every kind and description whatsoever, both permanent and temporary, for the due and expeditious commencement, prosecution, and completion of the works to be included in this contract, the whole to be finished in a most perfect and workmanlike manner, with good and approved materials, under the direction and superintendence and to the entire satisfaction of the company's engineer.

Conduct of works.

23. The works are from the commencement to be carried on in such degree of despatch as in the opinion of the engineer shall be proportioned to the time with which the whole is expected to be executed; and in case the contractors shall not commence the works at the proper time, or shall not continue them with reasonable despatch (possession of the land or such portions thereof as in the judgment of the engineer shall from time to time be required to be given, having been first given to the contractors), or in case the contractors shall not provide good and sufficient materials, or shall not employ as many suitable men, horses, engines, waggons, barrows, temporary rails and sleepers, and all other plant and materials, and such number of fully and authorized, experienced and fit agents and overlookers as are in the opinion of the engineer required for the efficient and expeditious conduct of the works, or shall not conduct and execute the works to the satisfaction of the engineer, then and in any such cases, upon notice of complaint signed by the engineer being given to the contractors, and if upon such notice they do not proceed in the execution of the contract

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and with such despatch as aforesaid, or do not supply such good and sufficient materials as aforesaid, or remove any work or men, horses or plant of every kind, or agent or overlooker complained of, or if they shall wilfully make default in any respect in proceeding with the execution of the works in a manner satisfactory to the engineer, the company shall have full power, by fourteen days' notice in writing, under the hand of the secretary or engineer, to remove the contractors from the further execution of the whole or any part of the works, and thereupon to employ any other person or persons to complete the same, and in the event of the company removing the contractors from the execution of the whole or any part of the works, then the company shall have full power, if they think fit, by themselves, their agents, servants, or other persons authorized by them to take possession of and hold all or any part of the contractors' materials, and all or any part of their waggons, horses, tools, implements and plant which may then be in or upon or near the works, or employed in or about the same, and to keep and employ the same, and any others they may find necessary in the further execution of the works or any part thereof, until the completion of the said works or for a less period, at the end of which time their waggons, horses and tools, implements, and plant, or such portion thereof as shall then be in existence, shall be returned to the contractors (but without any compensation for the use thereof, or the reasonable wear and tear in the meantime, and as to such of the said waggons, horses, tools, implements or plant, as shall then remain in the possession of the company, the same or any part thereof may be further retained by the company, if they shall think fit so to do, until the final settlement between the company and the contractors in respect of the matters and works executed and left unexecuted by them under their contract, and as a collateral security to the company for the payment of any sum of money which may ultimately be found due from the contractors, and in all cases the costs attending such measures shall be borne by the contractors, and the company shall be entitled to deduct any extra expense they may have incurred from any moneys owing to the contractors, or from the proceeds of the sale of any part of the materials which the company under the circumstances may possess themselves of, and in default thereof they may sue the contractors or their sureties in any of her Majesty's courts of law.

On default of contractors company may complete the works.

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24. The company shall provide the rails, chairs, and sleepers, and fish-plates, and the contractors shall find the whole of the remainder of the permanent way and materials and all labour necessary for the efficient laying of the permanent way, sidings, and other works hereby agreed to be executed by them, and the company shall have the power to reject any rails or other materials which may be damaged after being delivered to the contractors, and such rails or other materials shall be replaced by the contractors with new materials of equal quality to be approved by the engineer.

Permanent way.

Delivery of rails, &c. to contractors.

25. The company shall deliver the rails, and other materials to be provided by them as aforesaid, free to the contractors at any goods station on their existing line which they may select; and the contractors shall take delivery of such materials at the stations they may select, and sign a receipt for them, and shall remove them thence to and along the works at their own costs, carefully stacking them in such places as may be convenient, until they are required for laying the permanent way; and they shall be responsible for any loss or damage to the rails and such other materials so delivered to them as aforesaid.

Payment of workmen.

26. The workmen employed by the contractors in this contract shall be paid in cash at least once every fortnight, in an office or offices to be erected for this purpose.

Time for completion of works.

27. The contractors shall complete the whole of the works in this contract ready in all respects for opening the railways on or before the expiration of three years from the date of this contract, and the contractors shall pay to the company

Penalty.

the sum of 500*l.* a week for every week's delay in so completing the works for public use, such weekly sum to be paid and recovered as and for liquidated damages, and not in the way of penalty, and the company shall be at liberty to deduct or set off the same from or against any moneys to be paid by them under this contract.

Acceptance of work by engineer.

28. No work shall be considered as completed according to the contract unless accepted in writing by the engineer.

Copies of drawings, &c. to be provided by contractors.

29. The contractors will provide at their own expense copies of the drawings and specifications which shall be required by them for the use of themselves, their agents, or workmen.

Settlement of disputes by arrangement or arbitration.

30. The contractors shall be paid for the works done in manner hereafter provided for, and in the event of the drawings or specifications defining any work or finishings not mentioned

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or referred to in the schedule of prices, or in case of the contractors being lawfully required or necessarily obliged to execute any work not mentioned or provided for in the schedule, and such work being extended with the sanction of the engineer, the price to be paid by the company for such work shall be settled or agreed on between the engineer and the contractors, and should they be unable to agree thereon such prices shall be settled by arbitration under the provisions for arbitration hereafter contained; and in any such arbitration, so far as the same may relate to the prices to be paid for the division or removal of gas or water mains and pipes (other than service pipes), the arbitrators shall in fixing such prices have regard to and take into account any risks or contingencies which the contractors may incur or have incurred in or consequent upon such division or removal.

Measurement of works while in progress.

31. The works, as they proceed, shall be measured every month, in such manner, and by such persons as the engineer may determine upon and appoint, and the quantity of work done ascertained; and any assistance which the engineer may require for measurement taken on the ground, and all stakes, poles, and other articles which may, in the engineer's opinion, be required for setting out or taking measurement of the works, or any other cause whatever, shall be found by the contractors.

In case of dispute as to measurements engineer's decision to be final.

32. The contractors shall be at liberty to send their agents, with the company's measurer, in order, if practicable, that they may agree to the measurements; should the contractors neglect or omit to send such agents, or should no agreement in the measurements be come to, then the measurements of the company's measurer shall be accepted; or in the event of any disagreement as to the measurements, the decision of the engineer shall be final and conclusive.

Payments to contractors as works advance.

33. The payments to be made by the company to the contractors in respect of this contract shall be made in such proportion as the engineer shall consider the works to have advanced, and the amount of such payments shall be ascertained and calculated in manner herein provided, and according to the schedule of prices, and shall be made in cash, except as hereafter provided, upon certificates signed by the engineer; and which certificates the company hereby agree that the engineer shall regularly make and give. PROVIDED ALWAYS, that 5*l.* per cent. of each payment shall

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be retained by the company as a guarantee fund, until such retentions shall amount to the sum of 30,000*l.*, after which the full amount of the certificates shall be paid to the contractors.

Guarantee fund.

34. The guarantee fund shall be applied in or towards making good any defect or unsoundness which shall be certified to the engineer as existing in the said railways, works or undertakings, or the material used in the formation or construction thereof, and any default or neglect of the contractors in relation to the premises, and also in making good any breach of covenant on their part; but subject as aforesaid, one-half of the amount of the percentage which shall have been retained to form such guarantee fund (but without any interest or other income in respect of such percentage), shall, when the engineer has certified that the said railways, works, and undertakings are complete, and the same shall have been delivered over to the company, be paid in cash, except as is hereinafter provided, by the company to the contractors; and the other half thereof shall continue as a guarantee for the purposes aforesaid, until twelve calendar months from the date of such certificate of completion, and until a certificate shall have been signed by the engineer of the due and proper maintenance of the railways, undertakings, and works, during such period of twelve calendar months as aforesaid, and of the first acceptance of the railways and works under this contract, when such other half of this guarantee fund, or of the surplus thereof, if any, as aforesaid, shall be paid to the contractors in cash, except as is hereinafter provided.

Company to give all necessary notices.

35. The company shall give all notices necessary to be given to all public or local bodies or companies, or to any other person or persons whosoever, and shall do all acts of the like kind which shall be necessary in order to the commencement or prosecution of any of the works hereby contracted for, other than such as may be required by the contractors for temporary purposes, and the company shall use their best endeavours to procure the consent or approval of any such bodies, companies, person or persons, and all expenses incurred for and in the giving of such notices or obtaining such consent or approval, or consequent thereon, or in order to the compliance with any condition of such consent or approval shall be borne and paid by the company; and in

case by reason of the not giving of such notice or notices or not doing such acts as aforesaid, or in case of any other obstruction to the progress of the works occasioned by the acts or defaults of the company in these respects, any delay in the progress or completion of the works shall arise or be occasioned, then the time of such delay shall be added to the time agreed on for the completion of the works without prejudice to any claim to compensation for damage, if any, sustained by the contractors by reason of such delay.

Company may pay part of consideration to contractors in stock.

36. PROVIDED ALWAYS that it shall be lawful for the company, upon giving from time to time one calendar month's previous notice in writing of such their intention, to issue or transfer to the contractors in lieu of any sum not exceeding in the whole one-half the amount of any cash payment then due and to be made by the contractors, 5*l.* per cent. stock of the company, and the last payment for the time being represented by stock in the hands of the contractors by virtue of such issue or transfer shall carry interest at the rate of 5*l.* per cent. per annum as against the company for the time, in respect of such stock being issued or transferred until such stock shall be realized, and the dividends on such stock shall belong to the company: And the contractors shall from time to time be at liberty at their discretion to realize such stock, and give credit for the net proceeds thereof, and the difference between such net proceeds and the cash payments represented by the stock so realized shall be adjusted in the accounts of the company and the contractors on the occasion of the next certificate following each realization: And at the time prescribed for payment to the contractors of the first instalment of the guarantee fund, such stock as shall then remain unrealized shall be realized, and a final adjustment of accounts, except as to the guarantee fund, shall be made, and the balance paid in cash: And as to the guarantee fund the company shall be at liberty, when and as the same shall be payable, to pay without previous notice one-half thereof in cash and the other half thereof in such stock as aforesaid at the market price of the day.

Contractors to execute bond.

37. The contractors on the execution of these presents shall enter into and execute a joint and several bond (of which a copy has been submitted to and approved of by the contractors) in the penal sum of 50,000*l.*, for the due execution of and performance of all the works, matters, things,

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and presents aforesaid, and the completion thereof, in the manner and subject as aforesaid.

38. The matters herein referred to and specified as being in case of difference subject to settlement by arbitration shall, in case the necessity for such arbitration shall arise, be referred to A. B. of ———, and him failing, to an engineer, to be nominated by the President of the Institution of Civil Engineers; And every such arbitration and the award to be made thereupon shall be final and conclusive.

Arbitration clause.

39. And it is hereby agreed and declared by and between the said parties to the said presents that it shall be lawful for either of them to cause these presents to be made a rule of her Majesty's High Court of Justice.

Agreement may be made a rule of court.

In witness whereof the contractors have hereunto set their hands and seals, and the company have caused their common seal to be affixed the day and year first above referred to.

The Schedule above referred to.

XLIV. *AGREEMENT by a* Railway Company *for the* Working, *Management, Maintenance, and Repairs of a* Railway *belonging to* another Company.

ARTICLES OF AGREEMENT made the ——— day of ———, 18—, Between the L. B. and W. Railway Company (hereinafter called the L. Company), of the one part, and the M. W. Railway Company (hereinafter called the M. Company), of the other part. Whereas by the L. B. and W. Act, 18—, with which the Railway Clauses Consolidation Act, 1845, is incorporated, and by which the L. Company was incorporated, the L. Company is authorized to raise a capital of 300,000*l.* by shares, and to borrow on mortgage a sum not exceeding 125,000*l.*, and to make and maintain the L. B. and W. Railway, commencing by a junction in the parish of B. with the M. W. Railway, and terminating by a junction in the parish of D. with the ——— Railway; And whereas the said L. Company and the M. Company (hereinafter called the two companies) are authorized from time to time to enter into contracts or arrangements with respect to the following

Parties.

Recitals: Power of L. Company to raise capital and to make and maintain line.

Powers of the two companies to enter into working agreements.

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purposes or any of them, (that is to say) the working, management, maintenance, and repair of the L. Company's railway, and the collection, conveyance, and conduct of the traffic thereof and the supply of any rolling or working stock, or of any officers or servants required for such purposes, the fixing and bringing of the tolls, rates, and charges, arising on the L. Company's railway or on any part thereof, the division between the two companies of the receipts arising from the traffic upon the L. Company's railway, or which might have been conveyed on the same, and the payments to be made respectively by one company to the other with respect to any of those matters; AND WHEREAS the convenience of the public and the interest of the two companies, respectively, would be promoted by the working by the M. Company of the railway of the L. Company in connection with the railways of the M. Company, and the two companies have determined to enter into and execute these presents by way of agreement as hereinafter appearing; AND WHEREAS these presents have been submitted to and approved by not less than three-fifths of the votes of the shareholders present, personally or by proxy, at extraordinary meetings of the respective companies, parties to this agreement, specially convened for the purpose, the extraordinary meeting of the L. Company for the purpose having been held on the twenty-seventh and by adjournment on the thirtieth day of May, one thousand eight hundred and eighty-three, and the extraordinary meeting of the M. Company for the purpose having been held on the twenty-third and by adjournment on the thirtieth day of May, one thousand eight hundred and eighty-three. NOW THEREFORE THESE PRESENTS WITNESS that it is hereby mutually agreed by and between the L. Company and the M. Company as follows (that is to say):—

Of this agreement having been duly submitted to and approved by general meetings of the respective companies.

Agreement:

1. The expression "the L. Railway," wherever hereinafter employed, means and includes the L. B. and W. Railway as authorized by the recited Act; and the sidings, stations, works, and conveniences connected therewith, and those works and conveniences respectively include all works and conveniences for landowners and others which under Act of Parliament or contract the L. Company are already or hereafter shall be bound to make.

Interpretation of terms. "The L. Railway;"

2. The word "traffic," wherever hereafter employed, means and includes all passenger, small parcel, animal, goods, mineral

"traffic;"

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and other traffic whatsoever, whether local or through, and also all troops, police and mails to be conveyed by the M. Company on the L. Railway, or any part thereof.

"debenture debt;"

3. The expression "L. debenture debt," wherever hereafter employed, means and includes the amount from time to time secured by mortgages granted by the L. Company under the authority of the recited Act.

"paid-up capital."

4. The expression "L. paid-up capital," wherever hereafter employed, means and includes so much as from time to time is paid up, whether on deposit or calls, or in anticipation of calls, of the L. Company's capital of £300,000 by the recited act authorized to be raised by shares.

Completion of railway.

5. The L. Company will make and complete the L. Railway with a single line of rails on the narrow gauge, with sufficient lengths of double line at or near stations, and including all proper and sufficient crossings, cross-over roads, junctions, sidings, stations, station-houses, station fixtures, fittings and furniture, sheds, cranes, water tanks, water cranes, signals, electric telegraph, and other works and conveniences, and including all proper and sufficient dwelling-houses at level crossings where necessary, and so that the railway shall at the latest, by the time limited by the recited Act, or by any Act the L. Company may obtain for extending such time for the completion thereof, be completed and ready to be approved by the Government Inspector of Railways as being in all respects fit to be opened and used for public traffic, and to be approved by the engineer for the time being of the M. Company.

Appointment of joint committee of directors.

6. After the opening of the L. Railway, or any portion thereof for public traffic, and during the continuance of this agreement, a joint committee consisting of six directors, three of whom shall be chosen by the board of the L. Company, and three by the board of the M. Company, shall be, and form a joint committee for carrying out the provisions of this agreement, and all questions, matters, and things touching or relating to the order, management, and directions of the L. Company under this agreement, shall in all cases be determined, ordered and carried out by such joint committee, and at every meeting of the said joint committee one of the members thereof, selected alternately, from each of the said boards shall be chairman of such joint committee, and such chairman shall have no casting-vote.

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7. Provided always, that in case the board of either company shall neglect or refuse to name the three members to compose the said joint committee on their behalf, then, after the expiration of fourteen days' notice in writing, to be given by the secretary of the board of the company having nominated their members of the said joint committee to the board of the company not having nominated their members of the said joint committee, requiring them to nominate such members on their behalf, the members appointed by the one board as aforesaid shall be considered as and shall have all the powers of the said joint committee until the other board shall nominate three of their board to be members of the said joint committee.

In case of default of either company to nominate, the directors nominated by the other company may act.

8. The L. Company will insert in all contracts to be entered into with them for the execution of any of the works of the L. Company, exclusive of the permanent way, the usual provisions for the maintenance and repair thereof by the contractor for a twelvemonth after the completion thereof respectively.

Contractor to maintain permanent way for twelve months.

9. Before the opening of the railway or any portion thereof for public traffic, the L. Company will, to the reasonable satisfaction of the engineer of the M. Company, make all such arrangements as shall be proper and sufficient for enabling the M. Company, on and after the opening of the railway or the respective portions thereof for public traffic, to work and manage the same in accordance with this agreement.

Proper arrangements to be made.

10. If and whenever after the opening of the L. Railway or any portion thereof for public traffic, any additional sidings or other works or conveniences are found by the joint committee requisite for the due development or the safe and convenient reception, accommodation, conveyance or delivery of traffic thereon, or for compliance with the requirements of any Act of Parliament, or the obligations of any contract binding on the L. Company, the same shall, at the request of the M. Company, be provided for and at the expense of the L. Company, and they will provide and complete the same to the reasonable satisfaction of the engineer of the M. Company, and the same, when completed, shall, for the purposes of this agreement, be deemed to be part of the L. Railway.

L. Company to provide additional sidings if required;

11. If and whenever, during the continuance of this agreement, it is found by the joint committee necessary for the

to apply, if necessary, to Parliament

XLIV. Between two Railway Companies for Management and Working of Line.

fulfilment by the L. Company of any of the articles of this agreement to be fulfilled by them, that they make or incur any expenditure or liability beyond the amount which they then are authorized to raise by shares and by borrowing respectively, they will as soon as can be apply to Parliament for, and use their utmost reasonable endeavours to obtain, an Act authorizing them to raise the requisite amount by shares, and by borrowing on mortgage respectively. And in every such case the amount from time to time secured by mortgages granted by the L. Company under the authority thereof, shall, for the purposes of this agreement, be deemed to be part of the L. debenture debt, and so much of the amount thereby authorized to be raised by shares as is from time to time paid up in respect of deposits and calls, and in anticipation of calls thereon, shall, for the purpose of this agreement, be deemed to be part of the L. paid-up capital.

for additional powers of raising capital.

Limitation of liability.

12. Without prejudice to Article 11 the L. Company shall not be bound to make or incur for the purposes of this agreement any expenditure or liability exceeding the amount of the money applicable in that behalf, which they are from time to time authorized to raise by shares and by borrowing respectively.

Not to interfere with the exercise by M. Company of their rights under this agreement.

13. The L. Company will not at any time during the continuance in force of this agreement act as carriers on the L. Railway or any part thereof, and they will abstain from doing and concurring in any and every thing which might directly or indirectly interrupt, interfere with, or in any way disturb the exercise or quiet enjoyment by the M. Company of any of the rights, powers and privileges intended to be secured to them by this agreement.

M. Company to maintain, &c. the traffic.

14. On and for ever after the opening of the L. Railway or any portion thereof for public traffic, and during the continuance of this agreement, the M. Company may and will under the supervision and direction of the said joint committee work, manage, maintain and repair the same respectively, and collect, convey and conduct the traffic thereon in accordance with this agreement.

L. Company to be responsible for repairs, &c. for first twelve months.

15. During a twelvemonth after the opening of the L. Railway or any portion thereof for public traffic, the L. Company will as between themselves and the M. Company, and except only as respects the permanent way, be responsible for the same respectively being maintained in substantial repair and good working order and condition.

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16. On and for ever after the expiration of a twelvemonth after the opening of the railway or any portion thereof for public traffic, the M. Company will maintain the same respectively in substantial repair and good working order and condition, and upon the expiration of this agreement deliver, yield and give up the said railway in such substantial repair and good working order and condition to the L. Company.

M. Company thenceforth to repair, &c;

17. On and for ever after the opening of the L. Railway or any portion thereof for public traffic, and during the continuance in force of this agreement, the M. Company may and will under the supervision and direction of the said joint committee, with engines and carriages, use the same respectively for the purpose of all traffic thereon, which they from time to time can reasonably convey thereon, and as if the railway or the respective portions thereof were part of the M. Company's railways.

to have use of the railway.

18. On and for ever after the opening of the L. Railway or any portion thereof for public traffic, the L. Company will, during the continuance in force of this agreement, from time to time, under the supervision and direction of the said joint committee to the reasonable satisfaction of the engineer of the M. Company, afford to the M. Company all such accommodation and facilities as shall be proper and sufficient for the safe and convenient use by them of the same respectively, and the reception, accommodation, conveyance, and delivery of all traffic thereon.

L. Company to afford facilities.

19. On and for ever after the opening of the L. Railway or any portion thereof for public traffic, the M. Company will, during the continuance in force of this agreement, under the supervision and direction of the said joint committee, work and manage the same respectively, as part of the M. system of railways, and convey traffic thereon in a proper, safe, and convenient manner, and so as to fully develope the traffic of the district to be served by the railway, and from time to time will, under such joint supervision and direction as aforesaid, run proper and sufficient trains thereon, in a convenient connection with trains on the several lines of railway with which the L. Company has junctions.

M. Company to develop traffic;

20. With respect to the obligations under the recited Act of the L. Company to the ——— Railway Company, as regards booking through, and receiving, conveying, and forwarding traffic, the M. Company will from time to time after the

to take over obligations as to through booking, &c.;

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opening of the L. Railway or any portion thereof for public traffic, act as the agents of the L. Company, and duly perform their duties in that behalf.

conveyance of troops, &c.;

21. With respect to the conveyance of troops, police, or mails, or other traffic (if any), which the L. Company are from time to time specially called on to convey on the L. Railway or any part thereof, the M. Company will from time to time act as the agents of the L. Company in conveying the same, and duly perform the duties of the L. Company in that behalf.

to employ officials of L. Company;

22. On and for ever after the opening of the L. Railway or any portion thereof for public traffic, the M. Company will, under the supervision and direction of the said joint committee, and during the continuance of this agreement, provide and employ for the same respectively, all the superintendents, station masters, booking clerks, porters, engine drivers, guards, watchmen, workmen, and servants, and all other officers of the L. Company, except their secretary.

to provide engines and rolling stock;

23. On and for ever after the opening of the L. Railway or any portion thereof for public traffic, the M. Company will, under the supervision and direction of the said joint committee, and during the continuance of this agreement, provide in respect of the same, all such locomotive power, engines, carriages, trucks, and other rolling stock, plans, stores, materials, and labour as shall be proper and sufficient for the working and use of the railway, or the respective portions thereof by the M. Company, and the reception, accommodation, conveyance, and delivery by them of traffic thereon.

24. The L. Company shall not at any time be bound to employ or provide any person or thing to be provided or employed in accordance with Articles 22 and 23 respectively by the M. Company.

to exercise all powers, &c. of the M. Company;

25. On and for ever after the opening of the L. Railway or any portion thereof for public traffic, and during the continuance in force of this agreement, the M. Company shall exercise and enjoy at their own expense and risk, and for their own benefit for the purposes of the working, management, maintenance, and repair by them of the railway, or the respective portions thereof, all the rights, powers and privileges whatsoever in that behalf by the L. Company, and as fully and as effectually as if the railway or the respective portions thereof were part of the M. Railway.

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26. The M. Company will, in the exercise of their rights, powers, and privileges under this agreement, in all respects duly perform and observe, under the supervision and direction of the joint committee, the several provisions with respect to the working, management, maintenance, and repair of the L. Railway and every part thereof, and to the traffic thereon, contained in the Act or Acts from time to time in force with respect to the same, and will at all times fully and freely indemnify and save harmless the L. Company from and against all obligations and liabilities in that behalf, and all penalties, forfeitures, losses, damages, costs, charges, and expenses, claims and demands, whatsoever in any way occasioned or incurred by or by reason of any act or default of the M. Company, or any of their directors, agents, officers, or servants in relation thereto.

to observe statutory provisions, and indemnify M. Company from all liabilities and obligations;

27. On and for ever after the opening of the L. Railway, or any portion thereof, for public traffic, the M. Company will bear and pay all taxes, rates, assessments, salaries, wages and other outgoings in respect of the railway, or the respective portions thereof properly chargeable against revenue, except only land tax and rent charges payable to landowners as compensation for their lands and property, or income tax chargeable against the L. Company, and the remuneration of the directors and auditors of the L. Company, and the salary of their secretary, and their office expenses, which excepted liabilities shall be paid by the L. Company out of their revenue.

to pay taxes, rates, &c.;

28. On and for ever after the opening of the L. Railway, or any portion thereof, for public traffic, and during the continuance in force of this agreement, the M. Company from time to time will, under the inspection and direction of the said joint committee, make and satisfy all expenditure and liabilities with respect to the same respectively, whether chargeable against capital or against revenue, except the expenditure and liabilities properly chargeable against capital which can or may from time to time be made or satisfied by the L. Company, and except also the liabilities which, in accordance with Article 27, are to be paid by them out of their revenue.

to satisfy liabilities, &c.

29. If and whenever during the continuance of this agreement the M. Company make or satisfy any expenditure or liability of the L. Company properly chargeable against

Expenditure by M. Company chargeable against

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capital, the amount paid or applied by the M. Company in that behalf shall be a debt due to them from the L. Company, and shall bear interest at the rate of £——— per cent. per annum from the time of the payment or application of the same by the M. Company to the time of the repayment thereof by the L. Company.

capital to be a debt from the L. Company.

30. The interest from time to time payable on the L. debenture debt shall, in accordance with the respective extent and priorities of the mortgages from time to time securing the same, be the first charge on the gross tolls, fares, rates and charges in respect of the L. Railway, or any portion thereof, and the traffic thereon. Provided that, as between the two companies, but not so as to affect any of the L. Company's debenture creditors, the L. Company will apply the moneys from time to time belonging to them as hereinafter expressed, in the first place in payment of the interest on the L. debenture debt, and will indemnify the M. Company against all liability in respect thereof beyond the amount of those moneys.

Interest on debenture debt to be a first charge on gross receipts.

Tolls to be fixed by joint committee.

31. On and for ever after the opening of the L. Railway, or any portion thereof, for public traffic, and during the continuance in force of this agreement, the tolls, fares, rates and charges in respect of the same respectively, and the traffic thereon, shall, under the supervision and direction of the said joint committee, be fixed, collected, recovered and received by the M. Company: Provided that, except in special cases in which the general manager of the M. Company, with the consent of the joint committee, shall think it requisite to fix or quote any other tolls, fares, rates or charges, in order to meet any emergency or to secure any particular traffic which otherwise might not be carried on the railway, the tolls, rates, fares and charges to be so fixed shall, for every sort of traffic, be the same, or as nearly as circumstances will reasonably permit, as for light traffic on the M. Company.

Traffic to be booked through over L. line, &c.

32. All traffic to or from L. and stations and junctions on the L. Railway, or any extension thereof, to and from places on the M. Railway, or to which the M. Company carry, to which the L. Railway forms the shortest or part of the shortest route, shall unless otherwise specially directed by the consignor or the consignee or any other company be carried by the M. Company over the L. Railway, or accounted for to the L. Company as if so carried, and in order to facilitate the trans-

mission of traffic over and along the L. Railway in connection with the M. Railway, the said M. Company shall and will through book and invoice and give other facilities for the traffic from and to the places aforesaid, forming such shortest route or a part of such shortest route from or to the said L. Railway.

Application of gross receipts.

33. The gross amount of all the tolls, fares, rates, and charges from time to time payable to the L. Company and the M. Company respectively, in respect of the railway or the respective portions thereof, and the traffic thereon, shall be divided between and belong to the two companies in the following proportions (that is to say),—

First. The M. Company shall retain 52½ per cent. thereof, which shall belong to them, and shall cover all their expenses of and incident to the working, management, maintenance, and repair by them of the L. Railway and every portion thereof, and their other expenditure and liabilities under this agreement, except only as is otherwise provided by Article 30.

Secondly. The L. Company shall have the remaining 47½ per cent. thereof (hereinafter called the L. percentage), which shall be paid and belong to them.

Application of the percentage of the L. Company.

34. The L. Company shall apply the L. percentage as follows:—

First. In payment of the remuneration of the directors and auditors, and the salary of the secretary and their office expenses.

Secondly. In payment of the interest, not exceeding the rate of £——— per centum per annum, from time to time payable on the L. debenture debt, and a dividend at the rate of £——— per centum per annum on the L. paid-up capital, and which interest and dividend are hereinafter referred to as the guaranteed amount.

Thirdly. The surplus, if any, shall be applied as expressed in Article 40.

Rebate to be allowed in event of deficiency in L. percentage.

35. If and whenever during the continuance of this agreement the L. percentage proves insufficient to pay the guaranteed amount, then and in order to make up the deficiency the M. Company will allow to the L. Company as a rebate 40 per cent. of the gross amount of all the tolls, fares, rates, and charges from time to time receivable by the M. Company

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in respect of the several railways of which they from time to time are the owners or lessees, for all traffic arising or terminating on the L. Railway, or arising or terminating at the L. Station of the S. and N. Railway, and passing on those several railways or any part thereof.

What is to be included in gross receipts.

36. The gross amount referred to in Articles 33 and 34 respectively shall include a due mileage proportion of all through fares, rates, and charges, including all terminals, but less all paid ones and paid outs for terminal services not performed by the M. Company, but not exceeding respectively the amounts of the terminal charges.

As to rebate.

37. Provided that there shall be actually paid to the L. Company such part only of the rebate as is from time to time requisite for making up the deficiency of the guaranteed amount, and if and whenever the whole of the rebate is not required for that purpose then so much thereof as is not so required shall belong to the M. Company.

38. The payment of such rebate as aforesaid shall not be made so as to prejudice or affect any rents now payable by the M. Company or any section thereof, or any rights of any of the holders of mortgage bonds or debenture stocks created or hereafter to be created by the M. Company, nor shall it be made so as to prejudice or affect the rights or priorities of any of the holders of any guarantee or preferential stock or shares of that company or of any section thereof heretofore created or authorized to be created.

39. If and whenever during the continuance of this agreement any part of the rebate is applied for, making up the deficiency of the guaranteed amount, then the amount so applied shall be a debt due from the L. Company to the M. Company, but shall not bear interest, and shall be paid only as provided for by Article 40.

Application of surplus (if any) of L. percentage.

40. If and whenever during the continuance of this agreement the L. percentage is more than sufficient to make the payments, firstly and secondly expressed in Article 34, then the surplus of the L. percentage shall be applied as follows:—

First. In payment to the M. Company of the amount, if any, then due to them, the L. Company, as expressed in Article 39.

Secondly. In payment to the M. Company of the debt and interest, if any, then due to them from the L. Company, as expressed in Article 29, and the excess shall belong to the L. Company.

41. The several payments to be made to the L. Company, for the purposes firstly and secondly expressed in Article 34, shall be made at such times as to secure the payment of the remuneration, salary and dividend respectively half-yearly, on the 30th day of June and on the 31st day of December in every year, or within two months after those days respectively, and the payment of the office expenses and interest respectively, when and as the same respectively become payable.

Time for payment of salaries and dividends.

42. Each of the two companies will keep all such accounts and vouchers as shall be proper and sufficient for the purpose of this agreement, which accounts and vouchers shall be open at all reasonable times to the inspection and transcription of the directors and agents of the two companies respectively, and the two companies respectively will afford to each other all proper and sufficient facilities for the inspection and transcription thereof.

Accounts to be kept.

43. With respect to all through traffic passing to and from the L. Railway, and any of the several other railways referred to in Article 35, and whether or not also passing on any other railway, the accounts of the tolls, fares, rates and charges for the same shall be so kept as that equal mileage proportion thereof, including terminals, shall be attributed to the L. Railway, and to those several other railways respectively, so as to show clearly the fairness of the apportionment.

Apportionment of through traffic.

44. Each of the two companies will, within six weeks after the 30th day of June and the 31st day of December in every year, transmit to the other company an accurate abstract of such of the accounts as are from time to time necessary to be shown for any of the purposes of this agreement.

Abstracts of accounts to be exchanged,

45. If and whenever during the continuance of this agreement either of the two companies, within one month after the transmission to them of any abstract of accounts, shall require the other company to verify the same, such abstract shall be verified accordingly, and shall, if necessary, be made correct, and shall thenceforth be deemed a settled account. But if one month shall have been permitted to pass without the verification of the abstract of accounts having been required, the same shall thereupon be deemed a settled account, and no account once settled shall be reopened.

and verified, &c.

46. Every notice, request, account or other writing to be given by either of the two companies to the other of them for

Notices to be signed by secretaries of

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any of the purposes of this agreement, shall be sufficient if it be signed by the secretary of the company giving it, and be delivered to the secretary of the other company, or be left for them at their principal office.

respective companies.

47. The M. Company may, at any time or times within ten years after the opening of the L. Railway, for public traffic, apply for an Act for vesting in them the undertaking, railway, property, rights, powers and privileges of the L. Company, on the terms of all their debts and liabilities whatsoever being assumed by the M. Company, to the entire exoneration of the L. Company, and of an adequately secured perpetual yearly rent, payable to them by the M. Company, clear of all deductions, except for property or income tax, and sufficient to meet the payments first expressed in Article 34, and to pay a dividend at the rate of five pounds per centum per annum on the L. paid-up capital; and the L. Company, at the request and expense of the M. Company, will assent to and support any or every such application for an Act containing proper and sufficient provisions for those purposes.

M. Company may apply for statutory powers to take over the L. Railway.

Arbitration clause.

48. If and whenever any difference arises between the L. Company, or their assigns, and the M. Company, or their assigns, touching the time, intent or construction of this agreement, or touching anything to be done, suffered or omitted in pursuance of this agreement, or touching any of the incidents or consequences of this agreement, or touching the carrying into effect of any of the articles of this agreement, or touching any breach or non-fulfilment or alleged breach or alleged non-fulfilment of this agreement, or touching any liability, damages, losses, costs, or expenses by reason of any such breach or non-fulfilment or alleged non-fulfilment, or touching any claim or demand relating to any such liability, damages, losses, costs, or expenses, or otherwise relating to the premises, every such difference shall be referred to and determined by arbitration in accordance with the provisions of the Railway Companies Arbitration Act, 1859, and this article shall accordingly be and have effect as an agreement between the two companies for, and a reference to, arbitration under that Act.

Provision as to proposed amalgamation of M.

49. If, under any agreement or arrangement already or hereafter entered into between the M. Company and the ——— Railway Company, there is or shall be any amalgama-

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tion, or any arrangement resembling an amalgamation, whether complete or partial, of all or any part of the respective undertakings of those two companies, the amalgamation and arrangement shall be subject and without prejudice to the due fulfilment of this agreement on the part of the M. Company; and if and so far as shall be requisite for securing to the L. Company the several benefits intended to be secured to them by this agreement, the M. Company will procure the ——— Railway Company to adopt and give effect to this agreement; and if, and so far as the ——— Railway Company are or shall be under any such amalgamation or arrangement beneficially interested under or in respect of this agreement, they shall, to the extent of their beneficial interest in that behalf, and for the purposes of this agreement, be deemed to be "assigns" of the M. Company.

Company with another railway company.

In witness, &c.

XLV. *AGREEMENT between a Foreign Governmen with an English Company for the* Construction *and* Working of a Railway (*a*).

THIS INDENTURE, made the ——— day of ———, 18—, Between the government of his Majesty the King of ——— (and which government is hereafter referred to as the government), by A. B., the accredited agent of the government, of the one part, and the ——— Railway Company (and which railway company is hereinafter referred to as the company), of the other part. Whereas the government, considering that the construction of railways in ——— will be of great advantage to the public, have agreed to co-operate with the company in the construction of a line of railway from ——— to or near to ———, with a view to an extension thereof to the ———, in the manner and upon the terms and conditions hereinafter mentioned and contained. And

Agreement.

Deposit.

(*a*) This Precedent is given not as a complete form of contract, but merely as containing specimens of the various stipulations usual in such cases, which it is hoped may be of service in directing the attention of draftsmen to the principal points which must be considered in framing or settling contracts of this nature.

XLV. By Railway Company with a Foreign Government for Construction, &c. of Line.

WHEREAS it was one of the terms of the said agreement that the company should pay into the treasury of the government the sum of £——— sterling at certain times agreed upon; and in pursuance and part performance of such stipulation, the company have already paid into the treasury of the said government the sum of £———, part of the said sum of £———, as the government do hereby admit and acknowledge. AND WHEREAS the sum of £——— had been expended prior to the ——— day of ——— in the present year by the company, for the purposes of their undertaking in a manner approved of by the government. NOW THIS INDENTURE WITNESSETH, that in pursuance of the aforesaid agreement, and in consideration of the premises, the company do hereby for themselves and their successors (so far as the covenants and agreements hereinafter contained are to be observed and performed by them), agree with the government, and the government does hereby (so far as the covenants and agreements hereinafter contained are to be observed and performed by the government) agree with the company and their successors in manner following (that is to say) :—

Previous expenses.

Mutual covenants.

Selection of line.

1. That it shall be lawful for the government to determine, fix upon, and select the route and direction of a line of railway to be constructed as an experimental line of railway, such selected line of railway to commence at or near ———, and to take such a direction to or near to ——— that it may form part of a line of railway from ——— to ———, and such selected line of railway, of the estimated cost of £——— or thereabouts, shall be completed by the company and opened for the conveyance of passengers and goods, with all practicable speed.

Notice of line.

2. That the government shall give notice to the company of the line so selected as aforesaid, or of any part thereof, as such part shall from time to time be fixed upon; and it shall be lawful for the government from time to time to alter the said route or direction, or to extend or limit the same as they shall think fit, after such notice as aforesaid.

Land.

3. That the government shall, after the selection of the said experimental line of railway, or any part thereof, and from time to time as may be necessary, provide the land which shall be required for the said railway, and the works connected therewith, and proper stations, offices, warehouses, and other conveniences for the same, and shall from time to

time give to the company possession thereof: And that all land of which possession shall be so given to the company, which shall not be permanently required for the purposes of the company, shall, as soon as practicable, be restored to the government.

Works.

4. That the company shall, on receiving possession of the same land, or any part thereof, forthwith, and subject to the supervision and control hereinafter prescribed, commence and proceed with diligence in the construction of the said experimental line of railway, and of all such stations, offices, warehouses, fixed machinery, and other works and conveniences, as in the opinion of the government (such opinion to be certified in writing) shall be necessary or expedient, as well with reference to the original construction of the said railway and the working thereof, as with reference to the permanent maintenance thereof, and its protection from injury or destruction by inundations, tempests, or other causes whatever; and such railway shall be made at such gradients, and shall be furnished with rails of such weight and strength, and laid down and secured in such manner, and to consist either of a single or a double line of railway, as the government shall in writing direct; and shall, if required by the government, and at such time as they shall in writing require, be provided with an electric telegraph, constructed along all or any part of the said railway, and upon such principle, and to be under such regulations as to its use, and the terms of its use, as the government shall in writing direct or approve of; and the company shall from time to time attend to, execute, and perform all such directions in writing, as may from time to time be given by the government for any deviations from, or alterations in, any directions or requisitions previously made or given with respect to the premises; and the company shall, so soon as the said railway shall be completed for such a distance as in the opinion of the government shall be desirable, open the same for the conveyance of passengers and goods.

Opening.

5. That it shall be lawful for the government, from time to time, by notice in writing to the company, to require any specified part or parts of the said experimental line of railway to be completed as aforesaid, and to be opened for the conveyance of passengers and goods before the remaining part thereof shall be constructed.

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6. That the company shall pay into the treasury of the government the sum of £——— sterling (making together with the said sum of £——— so paid by them as aforesaid, and the said sum of £———, which has been already expended as hereinbefore is mentioned, the sum of £——— sterling), by the instalments and at the times following (that is to say), a sum of not less than £——— within four calendar months from the date of these presents, and thenceforth at the rate of not less than £——— per annum, in such sums, and payable at such periods of the year as shall be assented to by the government until the whole of the said sum of £——— shall have been paid up, which amounts may be paid in sums of £——— each into the treasury of the government at ———: Provided that if the company shall receive any portions of their subscribed capital in England, it shall be lawful for them to pay the amount so received in sums of not less than £——— to the ambassador for the time being of his Majesty the King of ———, in London, in or towards satisfaction of the instalments aforesaid, and the acknowledgment of such ambassador shall, when produced to the government in ———, be considered and taken in part satisfaction of the said sum of £——— so to be paid as aforesaid at the then current rate of exchange: Provided that such payments in London shall never exceed the amounts which may from time to time be determined upon by the government.

Money capital.

Drafts on capital.

7. That as often as and when any money shall be required by the company for any purposes sanctioned by the government, and in reference to the particular sums from time to time required, only so far as such purposes shall have been performed to the satisfaction of the government, or when any money shall be required for the performance of works sanctioned by the government, while the same shall be in course of execution, the same may be drawn in such sums as shall from time to time be necessary by the company in ——— or at ——— from the treasury of the government, according to such equitable arrangements as shall be made from time to time with the company for that purpose, but ten days' notice of every such draft or proposed draft shall be given at the said treasury, and all sums of money which shall be so drawn at ——— shall be set off at the exchange of ——— per £100 against the sum

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of £——— or so much thereof as shall have been paid into the treasury of the government as aforesaid, and the company shall not in any case be entitled to draw upon the treasury in ——— or at ——— to an extent greater than the balance in their favour for the time being.

Plant, fares, and tolls.

8. That when and so soon as the said line of railway, or any part thereof which shall have been required by the government, to be completed before the construction of the other part shall be completed and ready to be opened for the use of the public, and so from time to time as any such part thereof shall be so completed and ready to be opened, the company shall and will, subject to the supervision and control hereinafter mentioned, provide to the satisfaction of the government a good and sufficient stock of engines, carriages and other plant and machinery for working the said railway, or so much thereof as shall have been completed as aforesaid, and carrying on the business and traffic of the same, and the company shall and will forthwith commence and carry on the business of common carriers of goods and passengers upon the said railway, and for that purpose cause to be run on the said railway so many trains at such times, and at such rates of speed, and between such places, and with such conveniences and accommodations as the government shall from time to time require, and the company shall and will allow the use of the said railway to the public on such terms as shall be approved by the government, and the company shall be authorized and empowered to charge such fares for the carriage of passengers and goods and such tolls for the use of the said railway as shall have been approved by the government, and shall not in any case charge any higher or different fares or tolls whatsoever without such approval being first obtained, but such fares and tolls shall, when such receipts as are hereinafter mentioned shall in any year have exceeded 10 per cent. upon the outlay, be reduced in accordance with any requisition of the government in that behalf, but only with a view to limiting the said fares and tolls, so far that the net receipts shall not exceed 10 per cent. as aforesaid.

Title to land.

9. That upon the completion of the whole of the said line of railway, the government shall and will grant to the company a lease of, or otherwise secure to them, a right and title

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to the land which shall have been provided under the provision hereinbefore contained, or of so much thereof as shall be required for the completed line, and for the works and conveniences thereto belonging, for a term of ninety-nine years commencing from the day of the date of these presents under the provisions herein contained: And the government shall guarantee to the company the quiet and undisturbed possession of such land, but shall not be called upon to show any title thereto.

Supervision.

10. That the company and their officers, servants, and agents, as also their accounts and affairs, shall in all things be subject to the superintendence and control of the government as well in ——— as elsewhere, and in particular that no bye-laws, contracts, orders, directions, proceedings, works or undertakings, acts, matters or things whatsoever, shall be made, done, entered into, commenced or prosecuted, by or on the part of the company, unless previously sanctioned in writing by the government, or in some other manner to be prescribed by them, and that no money shall be raised by the company by any other means than by calls upon the shares in the same company, without the sanction of the government in writing, and no extension of the number of shares in the company, or in the amount of its capital, shall be made, unless sanctioned in like manner, and that it shall be lawful for the government from time to time to give to the company, their officers, servants and agents all such orders and directions as the government shall from time to time think fit with reference to the railway and works, to which this present contract relates, and with reference to the manner and times of executing the same, and with reference to any contracts, orders and directions to be entered into, made or given with regard thereto, and otherwise with reference to the same, all which contracts, orders and directions, shall be executed and followed by the company to the satisfaction of the government, the costs and expenses of the same which shall have been allowed and sanctioned by the government being paid out of the said sum of £——— sterling; and that for better enabling the government to exercise the control and direction intended to be hereby secured, the company shall record and keep in proper books for that purpose full and particular accounts and transactions and proceedings, including full and true minutes of all their meetings, meetings of

directors, communications with ——— so as at all times to exhibit thereby fully and truly the state of their affairs and proceedings; and that the government, and any person or persons appointed by them in that behalf, shall have, at all reasonable times, free access to all the books, accounts and documents of the said railway (except communications between the company and their legal adviser), and power to make copies of and extracts from the same, whether such books, accounts, papers and documents relate to the railway and works aforesaid, or to any other matters or things whatsoever, in which the company shall or may be interested; and for the purposes aforesaid it shall also be lawful for the government from time to time to appoint any one person, not being a shareholder in the company, to be an *ex officio* director of the company, which director, if and when appointed, shall rank as and be one of the board of directors of the said company, and be entitled in all things to act as such, and to exercise his discretion and right of veto in all proceedings whatsoever at boards of the directors, except proceedings for the purpose of communicating with the legal advisers of the company, and shall not be removable unless by order of the government, and shall, in case the whole number of directors shall at the time of his appointment be complete, be in the place of the director who shall retire from the direction according to the decision of the board, such decision being taken by ballot; but official directors shall not be entitled to any salary from the company. Provided always that nothing hereinbefore contained shall authorize the government to appoint any officers or servants of the said railway, except such official director as aforesaid.

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11. That all the expenses of the company shall from time to time be stated and submitted to the government for their sanction and approval, and as between the company and the government shall be allowed so far only as the same shall from time to time have been sanctioned and approved by the government: Provided always, that the last-mentioned stipulation shall not interfere with any such subsidiary agreement or agreements, if any, as from time to time may be made between the company and the government, for the performance of any part or parts of the said railway and works, at any sum or sums of money to be specified in such subsidiary

Sanction of expenditure.

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agreement or agreements, in which case the expenses in respect of the same shall be allowed and taken at the sum or sums which shall be so agreed on.

Capital account.

12. That a capital account relating to the construction of the said experimental line of railway, and the works, conveniences and telegraphs thereto belonging, and relating to the original cost of engines, carriages and other plant and machinery, shall be kept by the company, to which account all moneys paid by the company, the expenditure of which shall have received the sanction and approval of the government, shall from time to time be carried; and when and so soon as the said railway and works shall have been completed and furnished with the necessary rolling-stock and plant, the said capital account shall be made up, and a statement shall be furnished to the government of the aggregate amount of capital which, according to such account, shall have been expended, and such amount shall, by examination of such account, be ascertained and certified by the government; and thenceforth, and from the opening of the said line of railway, the cost of maintaining it, with its machinery and stock, in good working condition, shall be payable by the company out of the revenue of the said railway, including any interest to be received from the government as hereinafter is mentioned. But upon any additions, alterations and improvements, such as shall properly be chargeable to the capital account, being thereafter made with the sanction and approval of the government, of or in the said railway, or the works, conveniences or telegraphs thereto belonging, or the engines, carriages and other plant and machinery, the cost necessarily incurred in executing such additions, alterations or improvements shall be added to the said capital account, and the said capital account shall from time to time be made up and stated afresh, as occasion shall require, and be ascertained and certified accordingly.

Repairs.

13. That at all times during the said term of ninety-nine years the company shall keep the said railway, or so much thereof as shall be completed, and the works and conveniences belonging thereto, and the telegraphs on the said railway (if any) in a state of good repair, and in good working condition, to the satisfaction of the government; and shall keep the same fully provided with rolling-stock and plant adequate to the service thereof, to the satisfaction of the government.

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14. That the company shall, in such forms and under such heads or divisions as shall be prescribed by the government, keep accounts of all receipts and payments whatever in respect of their undertaking and business, except such receipts and payments as shall properly belong to the capital account hereinbefore agreed to be kept; and such accounts shall be called "The Revenue Accounts of the Company," and shall be made up half-yearly to the ——— day of ———, and the ——— day of ——— in every year, or to such other day in the year as the company shall appoint, and shall be regularly transmitted to the government, who shall be at liberty at all times, in auditing the said accounts, to make any corrections therein which may be necessary.

Revenue account.

15. That all moneys whatever (except the money covenanted by this agreement to be otherwise paid) received by or on account of the company in ———, shall, without any deduction under any pretence whatever, be paid to the government at such times and in such manner as they may direct, to an account to be kept separately, and to be called, "the revenue account" of the company, and when any money shall be required by the company for any purposes sanctioned by the government, and in reference to the particular sums required only so far as the government shall be satisfied that the work has been performed, such money may be drawn by the company according to such arrangements as shall from time to time be made with the government for that purpose.

Deposit of revenue and drafts thereon.

16. That the government shall from time to time during the said determinable term of ninety-nine years pay to the company half-yearly on the ——— day of ———, and the ——— day of ——— in every year interest at the rate of £——— per cent. per annum, on the said sum of £——— sterling, or on such parts thereof as shall for the time being be paid into the treasury of the government as aforesaid (including the said sum of £——— expended as aforesaid, which shall for all the purposes of these presents be regarded as having been paid into the said treasury on the date hereof, and drawn out for the purposes of the company), such interest upon any part of the said sum of £——— being considered, in the first instance, as running from the day on which the same shall have been so paid, or be deemed to have been so paid, into the treasury of the government.

Guarantee of interest.

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17. That if the expenditure of the company in making the said railway and works, or otherwise in respect of the matters to be included in the said capital account, shall exceed the said sum of £———, the money necessary to meet such excess having been raised and paid by the company into the treasury of the government, the same company shall from time to time, during the then residue of the said determinable term of ninety-nine years, pay to the company half-yearly from the days aforesaid interest from the rate of £——— per cent. per annum on the same money in respective times when they shall have been so paid into the treasury of the government as aforesaid.

Excess above £——.

Limitation of extent of railway.

18. That if after the selection of the said line of railway the government, under the power hereinbefore reserved to them in that behalf, shall, with a view of keeping the expenditure within £———, or for any other reason, think fit to limit the extent of the said line of railway, the provisions herein contained with reference to the originally intended line of railway shall apply to the said limited extent of railway in the same manner as if the same had been originally selected: Provided always that in case of any alteration in the selected line of railway all expenditure which shall have been incurred by the company, and which shall have been sanctioned and approved by the government, shall be considered as properly expended, although the same may, in the event, be useless for the purpose of the said railway as finally adopted.

Application of profits.

19. That so soon as the company shall begin to work the said railway, or any part thereof, the net receipts which shall be realised during any half-year, or from the commencement up to the first of the aforesaid half-yearly days, after deducting therefrom all sums which shall have been expended in the repair and maintenance of the said railway works, and the repair and restoration of the rolling-stock and plant, and the management and conduct of the company and affairs, and which shall have been sanctioned by the government, and also deducting such sum, if any, as with the consent of the government, may be appropriated and set apart for restoring and making good any deterioration of the railway and works, or stock and plant, and for the current expenses of working the railway (the money to be so appropriated and set apart as a reserve, or any part thereof

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being invested or accumulated or otherwise dealt with till required for application in any manner the said railway may think fit, subject to the sanction and approval of the government) shall be applied in the first place in or towards discharge of the interests which shall be payable by the government under their covenants hereinbefore contained in respect of the said half-year, so as to exonerate the government, so far as the same net receipts will extend, from the payment of such interest, the money to be so applied being reckoned at the exchange of ———, and the residue, if any, of such net receipts shall be applied in manner following (that is to say): one moiety thereof shall be forthwith applied in the payment of such sums of money as shall at any previous time or times have been paid by the government to the company under the covenants hereinbefore contained by way of interest as aforesaid, together with simple interest on such sums of money at the rate of £——— per cent. per annum, from the times of payment respectively, and such moiety shall be paid into the treasury of the government, and shall be reckoned at the said rate of exchange, and shall be applied in reduction and discharge of the whole of the interest payable to the government on the said sums of money before the same shall be applied in liquidation of any part of the principal thereof, and the other moiety of the said surplus net receipts shall be paid to or applied for the use and benefit of the company; and if at any time during the said determinable term of ninety-nine years the whole of the moneys previously paid by the government as aforesaid, with interest thereon as aforesaid, shall have been repaid and discharged, then for every half-year during such time, and as often as the same shall happen, the company shall be entitled for their own use and benefit to the entirety of the said surplus net receipts, or as the case may be so much thereof as shall remain after such repayment and discharge as last aforesaid shall have been made.

Mails and troops.

20. That the company will, at all times during the said determinable term, convey on the said railway, the mails and post bags, and the guards and other servants of the post office in charge thereof, free of charge, and when on duty, all officers and persons in the administration of the post office, also free of charge, and will also convey on the said railway, when

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they are on duty, the troops, both horse and foot, as well as artillery, engineers, and other branches of His Majesty's forces, and all employès of the government, and all artisans of, or when on the business of, the government, the officers and persons of similar station in life to be entitled to travel in first class carriages at second class fares, and the troops and artisans and other persons aforesaid at the lowest fares, and will also convey on the said railway all general stores belonging to the government, and all guns, ammunition, horses and other animals used for military purposes, and all military stores, carriages, waggons, camp equipage and equipments whatsoever, at the lowest rate for the time being chargeable for the carriage of such animals, goods and merchandise, the several privileges of conveyance and carriage stipulated for being at all times to be used and enjoyed in preference to and priority over the public use of the said line of railway for conveyance and carriage.

Ultimate rights of property.

21. That at the end of the said term of ninety-nine years, by effluxion of time, the land to be provided as aforesaid, with the railway thereon, and all buildings, works, fixed machinery, telegraphs and conveniences whatsoever, shall revert to and become the property of the government, on account of the government, free from all debts and charges whatever, save such as shall have been sanctioned by the government; and any lands in ———, which may then have been held by the company for the purpose of their business, shall be sold, and the clear moneys produced by such sale shall be paid to the government on the same account; and the company shall deliver to the government, as their absolute property, on the same account, all plans, surveys, sections, books, printings, writings and documents whatsoever in anywise connected with the undertakings and affairs of the said railway; and the said railway shall sell to the government, who shall be bound to purchase the same, all the engines, carriages, stock, machinery and plant, which shall then be used in working the said railway, or otherwise in connection therewith, for such sum of money as shall be determined by valuation, to be made by referees or their umpire in case of difference, to be respectively appointed in the usual manner, and the government shall pay to the company in £———, the sum of money to be so determined within four months

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after such determination, with interest thereon at the rate of £——— per cent. per annum, from the expiration of the said term of ninety-nine years.

Surrender.

22. That after the said line of railway shall have been finished and in work for three calendar months at least, it shall be lawful for the company then or at any time thereafter to give notice in writing of their intention to surrender and relinquish the said railway and works to the government on any day to be mentioned in such notice, so that such notice be served at least six calendar months before that day both on the government in ———, and also on the secretary of the government at ———, and in case of such notice being given the company shall at the expiration thereof surrender and relinquish the said railway and works accordingly, together with the telegraphs (if any), and shall with all convenient speed sell any lands in ———, which may then be held by the company for the purpose of their business, and pay the clear moneys to be produced by such sale to the government, and shall deliver to the government the engines, carriages, stock, plant, and machinery belonging to the said railway and works, and all plans, surveys, books, printings, writings, and documents whatsoever, connected with the undertaking and affairs of the company, and the government shall be bound to accept the premises to be surrendered and delivered (it being expressly agreed that the said railway, works, telegraphs, engines, carriages, stock, plant and machinery, shall at the time of such surrender and delivery be in good working order) according to the covenant in that behalf hereinbefore contained on the part of the company; and immediately upon such surrender and delivery being made, the government shall be bound to pay to the company the capital expended by the company ascertained in certificate and certified in manner hereinbefore mentioned, together with such part (if any) of the said sum of £——— as shall remain in the hands of the government, and thereupon the aforesaid covenants for payments shall cease as from the day upon which the government shall be bound to accept the said railway and works, and all claims by the government on account of interest or otherwise on the company, the amount of all other claims or demands of any sort then existing against the company on their revenue account in respect of their undertaking, and which shall not be shown to have been fully satisfied and

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discharged, until the same shall be shown to be so fully satisfied and discharged. Provided also that the government shall not be liable to refund any sum expended in the maintenance or working of the line after the same shall have been opened, which sum is to be provided by the company out of the revenues of the line and interest as hereinbefore provided or otherwise.

Right of purchase.

23. That at any time within six calendar months after the expiration of the first twenty-five years of the said term of ninety-nine years, or at any time within six calendar months after the expiration of the first fifty years of the said term, it shall be lawful for the government to give notice to the said ———, in ———, and at ———, of their intention to purchase the said railway and works, together with the telegraphs (if any), and the engines, carriages, stock, plant, and machinery belonging to the said railway and works, but subject to such debts and liabilities, if any, as may have been incurred to the government (exclusive of any arrears of interest on the capital of the company, which shall have been paid under the conditions of this agreement, and which shall then be still due), to any person and persons, with the sanction of the government, and to interest on such of the said debts as carry interest from the day on which they shall take possession of the said railway, but not from any earlier time, and thereupon at the half-yearly day next but one following such notice, the land to be provided as aforesaid, with the railway thereon, and all buildings, works, fixed machinery, telegraphs, and conveniences whatsoever, shall revert to and become the property of the government, as the owners thereof by purchase, on account of the government of ——— ; and in case any lands in ——— shall then be held by the company for the purpose of their business, the same shall be sold, and the clear moneys to be produced by such sale shall be paid to the government ; and the company shall at the same time deliver to the government the engines, carriages, stock, plant, and machinery belonging to the said railway and works, and all plans, surveys, sections, books, printings, writings, and documents whatsoever in anywise connected with the undertaking and affairs of the company ; and the government shall be bound to pay in ———, on the said half-yearly day, for the purchase of all the same premises, the full amount of the value of all the shares or capital stock in the company, calculated accord-

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ing to the mean market value in ——— of such shares or stock during the three years immediately preceding the expiration of the said period of twenty-five years, or the said period of fifty years, as the case may be; and shall also be bound to indemnify the company against all such debts and liabilities (if any) as they may have incurred to or with the sanction of the government, and as shall be then subsisting; and thereupon the aforesaid covenant for payment of interest shall cease.

Possession as a remedy.

24. That if default shall be made by the company in the payment of the said sum of £———, or any of the instalments thereof, or in the due application of any money drawn from the treasury in ———, or ——— as aforesaid, or in the execution of the said railway and works conformably with their aforesaid covenant in that behalf, or in case the said railway shall not be worked to the satisfaction of the government, or in case of any other breach on the part of the company of any of the covenants herein contained, it shall be lawful for the government, on giving to the said railway company at ——— three calendar months' notice of their intention in that behalf, to terminate the interest of the company in the said land, railway, telegraphs, and works, and of all or any of the engines, carriages, stock, plant, and machinery provided for the same, and all plans, surveys, sections, books, printings, writings, and documents whatsoever, in anywise connected with the undertaking and affairs of the company; and in that case any lands in ——— which may then be held by the company, for the purpose of their business, shall, with all convenient speed, be sold, and the clear moneys to be produced by such sale shall be paid to the government; and in case of such notice being given, the government shall be liable to repay, within six calendar months of its expiration, to the company the capital expended by the company, so ascertained and certified as hereinbefore mentioned, after a proper deduction for all debts and liabilities then affecting the company or the property of the company, the money so to be repaid to include so much (if any) of the said sum of £——— as shall then remain in the hands of the government. And thereupon the aforesaid covenants of the government for payment of interest shall cease, and all claims by the government on the said railway shall also cease.

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25. That if default shall be made by the company, after the railway shall have been opened, in their covenant to keep the said railway and works in repair and condition for the space of one calendar month next after notice in writing in that behalf from the government to the company at ———, it shall be lawful for the government by their agents to enter on the railway and works, and do and execute all such works as may be required in fulfilling the said covenant, and to charge the expenses of the same against the company, by setting off the amount of such expenses against any moneys then payable, or which shall thereafter become payable by the government for interest in manner hereinbefore mentioned, which interest shall in such case to that extent be considered as paid and satisfied by such set-off or retainer; and shall for all the purposes of these presents be regarded and considered as interest actually paid by the government to the said railway, in pursuance of their aforesaid covenant in that behalf. And if such expense shall not be satisfied by such set-off and retainer as aforesaid, then the government may set off and deduct the same against and from all or any part of any other moneys which shall on any account whatever be or become payable by the government to the company.

Repairs by the company.

Annuity compensation.

26. That in every or any case in which, under the provisions of these presents, the government shall become bound to repay the capital expended by the company as aforesaid, or in which the government shall become liable to pay for the purchase of the said railway, works, and stock, before the expiration of the said term of ninety-nine years, it shall be lawful for the government, instead of paying a gross sum of money in respect of the premises, to declare by notice to the company in ——— their option to pay an annuity, to be reckoned from the time when the gross amount would be payable, and to continue during the residue of the said term of ninety-nine years; and in that case such annuity shall be payable in London on such two half-yearly days in the year as shall be selected by the government in that behalf, with a fractional part for any broken half-year, the rate of interest which shall be used in calculating such annuity being determined by the average rate of interest during the preceding two years received in ——— upon public obligations of the government, and which shall be ascertained by reference to

the governor or deputy-governor of the bank of ——— for the time being. Provided always, that the aforesaid option shall not apply to the undrawn portion of the aforesaid sum of £———, which portion is to be repaid to the company with interest, under the provisions in that behalf hereinbefore contained, in case the company shall relinquish or be deprived of the said railway and works as aforesaid.

Return of surplus.

27. That if, after the said railway and works, including the telegraphs if required, shall have been completed and furnished with adequate working stock, the whole of the said sum of £——— shall not have been required for the purpose of the said capital account, the surplus thereof shall to the extent to which the same shall have been received by the government be refunded by the government to the company in ——— with such interest as shall be due on such sum at the time; and thereupon the aforesaid covenants for payment of interest shall apply only to the amount of the said capital account, and such last-mentioned amount shall for all the purposes of these presents be considered as substituted in lieu of the said sum of £———.

Notices, &c.

28. That any notice, direction, approval, or sanction to be given or signified on the part of the government for any of the purposes of these presents, shall be sufficient and binding, if signed by the minister for public works of his Majesty the King of ———, or by the secretary of such minister, or by any other officer or servant of the government authorized to act on behalf of the government in respect of the matters to which the same shall relate; and that the government shall not in any case be bound in respect of the matters aforesaid, unless by some writing signed in the manner before mentioned.

Railway office and agent in the foreign country.

29. That the company shall forthwith cause to be established in ——— an office of the company, and keep the same at all times hereafter during the said term established at ———, and the company shall keep at the said office an authorized agent or agents, with whom the government may communicate on affairs concerning the said railway, and all drafts drawn by the said agent or agents, and all receipts of and acts done by such agent or agents on behalf of the company, or concerning the said railway, works and stocks, shall be binding on the company, and every notice to be

XLV. By Railway Company with a Foreign Government for Construction, &c. of Line.

given to the company shall be sufficiently given if left at the said office, or personally served on such agent or agents.

Legislation.

30. That the government shall promote the passing, by the Legislature of ———, of all statutes, orders, and other measures which shall be necessary or convenient for enabling the company to fulfil in ——— the objects of their undertakings, according to the terms and provisions of these presents.

Extension to ———.

31. That in case the government and the company shall hereafter deem it expedient that the said line of railway shall be extended to ———, and the company shall increase their capital to £——— sterling, as hereinbefore mentioned, the additional capital to be raised shall be paid into the treasury of the government, at such times and in such sums as shall be mutually arranged between the government and the company, and all and singular the provisions of these presents, with reference to the said capital of £———, and the said line of railway to or near to ———, shall in all respects be held to apply, *mutatis mutandis*, to such increased capital of £——— sterling, and such extended line from ——— to ———, and the capital account of the company shall be dealt with accordingly, and in all other respects the said increased capital and extended line shall be held to be within the covenants hereby entered into, according to the true intent and meaning of these presents.

In witness, &c.

XLVI. *AGREEMENT for the* EXCLUSIVE PRIVILEGE *of* SELLING *a* PATENT MEDICINE *in the* UNITED KINGDOM *for* TWENTY-ONE *Years*, DETERMINABLE *at the end of the first Seven or Fourteen Years.*

Parties.

ARTICLES OF AGREEMENT made this ——— day of———, 18—, Between [*proprietor*], of &c., of the one part, and [*agents*], of &c., druggists, of the other part.

Interpretation clause.

1. In this agreement the term the proprietor includes the

XLVI. Exclusive Right to sell a Patent Medicine.

said proprietor, his executors, administrators, and assigns, or other the proprietor or proprietors for the time being of the medicine or composition hereinafter mentioned, and the term the agents includes the said agents and the survivor of them, his executors or administrators, and their or his assigns.

Appointment of agents for seven years.

2. The agents shall be and are hereby appointed the sole wholesale vendors, for the term of twenty-one years from the date hereof (but determinable as hereinafter is mentioned (*a*)), of a certain medicine or composition, called ———, whereof the proprietor is now the sole proprietor or owner.

Proprietor to supply medicine during the term at certain prices.

3. The proprietor shall sell and supply to the agents the said medicine or composition, and deliver the same free of expense, during the continuance of the said term, in such quantities (not being of less amount at one time than 100*l.* in value), with proper directions, and in every way ready for sale, as shall from time to time be required, and of the same quality as the same hath been hitherto composed, at the rates or prices following (that is to say): the larger packets at ———*s.* per dozen for such as have been usually sold wholesale at ———*s.* per dozen, and to the public at ———*s.* per pot, and the smaller size at ———*s.* per dozen for such as have been usually sold wholesale at ———*s.* per dozen, and to the public at ———*d.* per pot, all stamp duty on each included (*b*).

(*a*) If the agreement is for a perpetual agency, say,

Perpetual agency.

"2. In consideration of £———, already paid by the agents to the proprietor, the agents shall be and are hereby nominated, constituted, and appointed the sole and irrevocable perpetual agents of him the proprietor of the said medicine or composition called ———, for the selling, publishing, and distributing the said medicine or composition" (*proceeding as in the text, mutatis mutandis*).

(*b*) If the agreement is for a perpetual agency, it may be added:

Agents to be entitled to engraved plate.

"The agents shall be entitled to the sole property in, and to all advantages arising from the engraved plate respecting or relating to the said medicine or composition, now or late in the possession of her Majesty's Commissioners of Stamps at Somerset House, and to all the impressions therefrom now

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4. In case any of the said medicine or composition so to be supplied as aforesaid, shall become spoiled and unfit for sale in any other manner than by breakage, the proprietor shall exchange the same for a like quantity, in a good and saleable condition.

To replace spoiled medicine.

Proprietor not to supply medicine to other persons,

5. The proprietor has full right to grant the exclusive privilege hereby conferred, and to enter into the agreements herein contained, and shall not at any time during the said term sell or supply to any person or persons whomsoever other than as aforesaid, any of the said medicine or composition under its present name or appellation, or by any other name, without the consent in writing of the agents first had and obtained, save and except as in the next article is mentioned.

except in specified places.

6. The proprietor shall be at liberty to sell the said medicine or composition to any person or persons residing in any of the following places; that is to say, ———, in the county of ———; ———, in the county of ———; and ———, in the county of ———, at the prices hereinbefore mentioned as the wholesale prices of the said medicine or composition (*c*).

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existing or hereafter to be taken; and in case the said plate shall have been destroyed or become useless, that they or he respectively shall be at liberty to substitute a new one."

If proprietor neglect to supply medicine, agents may compound it.

"In case of the refusal or neglect of the proprietor to supply the said medicine or composition to the agents, agreeably to the third article hereof, it shall be lawful for the agents to make and compound so much of the said medicine or composition as they or he may have occasion to sell or dispose of, agreeably and in conformity to the original recipes of the said medicine, deposited with the agents, upon the execution of this agreement, and which recipe shall remain in the custody of the agents."

"The agents shall not in any case divulge, publish, or make known, either directly or indirectly, the contents of the said original recipe, or the manner of making or preparing the said medicine or composition, nor shall they or he make any use of the said recipe, except in case of some or one of the events happening, which are provided for by the last preceding article."

(*c*) *Or*, "The proprietor shall be at liberty to sell the said

XLVI. Exclusive Right to sell a Patent Medicine.

7. The proprietor shall, at the expense of the agents, whenever so required during the said term, verify by statutory declaration, that the said medicine or composition so to be supplied as aforesaid, is of the same goodness, quality, and composition as that of the same name which hath hitherto been prepared and sold to the public (*d*).

Proprietor to make declaration as to quality of medicines.

8. The style and firm of [*name of agent's firm*] only shall appear and be made use of in all advertisements, bills, and other publications for promoting the sale of the said medicine or composition as the only wholesale vendors in Great Britain and Ireland, to the exclusion of all other names.

Advertisements, &c. to be in agent's name.

9. On delivery of each parcel of the said medicine or composition to the agents, in pursuance of an order for the same (no order being for a less amount than 100*l.* worth as aforesaid), the agents shall pay the proprietor for the quantity of the said medicine or composition so delivered, after the rate mentioned in the second article hereof by a bill of exchange, payable in six months after such delivery, or shall, at the option of the agents, pay for the same in cash at the time of such delivery, deducting from the amount thereof a discount of 5*l.* in the hundred.

Mode of payment.

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medicine or composition by retail only, and at the full retail prices, at his usual place of business for that purpose in London, but shall, for that purpose, purchase the same from the agents, at the usual wholesale price."

(*d*) "And that such declaration shall be to the following purport or effect (that is to say): That having appointed [*agents*] sole and exclusive agents for the sale of the genuine ———, and in order that the said medicine or composition might be rendered more secure from spurious imitations, the party or parties making the declaration had duly authorized the agents, or the survivor of them, his executors or administrators, or their or his assigns, to affix the stamp containing their names and address to each bottle of the said medicine; and that no medicine but that sold by the agents, or the survivor of them, his executors or administrators, or their or his assigns, was genuine; which original declaration shall be delivered to the agents, who shall be at liberty to print copies thereof to be delivered with each bottle of the said medicine or composition."

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10. All such expenses as shall be incurred by the agents in advertising and making public the said medicine or composition, according to the direction of the proprietor, shall be allowed and deducted from time to time as cash, and allowed in the settlement of accounts between the parties (*e*).

Certain expenses to be borne by proprietor.

11. The agents shall, during the continuance of the said term, sell and supply the said medicine or composition to all such persons in the United Kingdom and elsewhere with whom they now or may hereafter deal, who shall apply for the same, and who shall conform to the general regulations amongst the wholesale medicine dealers.

Agents to sell medicine to all persons.

12. The said agents shall not at any time or times during the continuance of the said term, sell or supply any medicine or composition whatsoever, as an imitation or pretended improvement of the said medicine or composition, nor any of the same name, except such as shall be bought of the proprietor in manner aforesaid.

Agents not to sell any imitation medicine, or other medicine of the same name.

13. As a security to prevent the said medicine from being counterfeited or imitated, the name, firm and style of [*agents' firm*] shall be inserted in all the stamps or labels used in the sale of the said medicine or composition, and none of it shall be sold unless such stamp be affixed thereto.

All stamps to be in agents' name.

(*e*) *Or*, "All orders for advertising the said medicine or composition shall be mutually agreed upon, in writing, between the said parties, and that the expenses incurred on that account shall be borne between the said parties, in equal moieties, and allowed for on the settlement of accounts, upon that footing, to each party who shall produce to the other vouchers for the same."

Advertisements to be mutually agreed upon and expenses divided.

£100 to be expended in advertising during first year.

"The amount of expenditure for advertising the said medicine during the first year of this agreement, shall not be less than 100*l.*, but that the amount thereof afterwards shall be mutually agreed upon as in the last article."

The following clause may be inserted or not, according to the intention:—

Allowance for goods returned.

"The amount of any of the said medicine which may have been sent by the agents to any vendor or vendors, upon sale or return, who may not have received or ordered a second supply thereof, and who may not have accounted for the same, shall from time to time be deducted as cash, and allowed to the agents in the settlement of accounts."

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14. All accounts between the said parties, concerning the said medicine or composition, shall be annually settled between them, up to the 31st day of December in every year, and the balance of such accounts paid by a bill of exchange, at two months from that period, first deducting all such moneys as shall have been paid by the agents, under the direction of the proprietor, for advertisements, hand-bills, carriage, and other expenses, and deducting the value of such quantities of the said medicine or composition as shall have been sent to such vendors who have not received or ordered a second supply, or shall have been sent to country dealers, and returned unsold.

Accounts to be settled annually.

Principle on which accounts are to be settled.

15. The proprietor shall at all times hereafter well and sufficiently save harmless, and keep indemnified, the agents of, from, and against all manner of actions, suits, attachments, prosecutions, and other proceedings of what nature or kind soever, which shall or may be brought, commenced, or presented against them, any or either of them, and also from and against all costs, charges, damages, and expenses which they or any of them may in any wise bear, pay, or be put unto, in defending and settling the same, in consequence of their advertising, publishing, or selling the said medicine or composition, as being prepared by or as the property of the proprietor, or for or in respect of any matter or thing in relation to the said medicine or composition.

Proprietor to indemnify agents against costs of defending the title to medicine, &c.

16. In case of breach or non-performance hereof by any of the parties to these presents, the party or parties so breaking or neglecting to observe the same shall forfeit and pay unto the other party or parties the sum of 200*l.* as liquidated damages, and not in the nature of a penalty.

Liquidated damages.

17. The above-mentioned term of twenty-one years may be determined at the expiration of seven years or of fourteen years from the date hereof, upon notice in writing being given by or to the proprietor, to or by the agents, three calendar months before the expiration of such seven or fourteen years from the date hereof.

Proviso for determining agency at the end of the first seven or fourteen years.

In witness, &c.

XLVII. *AGREEMENT for the* PURCHASE *of the sole* RIGHT *of Compounding and Vending a* MEDICINE, *in consideration of a* MOIETY *of the* PROFITS *to be paid during* TWELVE YEARS.

ARTICLES OF AGREEMENT, made this ——— day of ———, BETWEEN [*proprietor*], of &c. (hereinafter called the proprietor), of the one part and [*purchaser*], of &c. (hereinafter called the purchaser), of the other part: WHEREBY IT IS AGREED as follows:—

Parties.

Sale of interest in medicines.

1. The proprietor, for the considerations hereinafter mentioned, hereby grants and assigns unto the purchasers all and singular the right and interest of him the proprietor, of and in certain medicines or preparations called respectively ———, whereof the proprietor is the sole proprietor and owner.

Proprietor to disclose secret by writing of even date.

2. The proprietor shall in a certain paper writing under his own hand, and bearing even date herewith, set forth full, true and perfect recipes for the making up or compounding the aforesaid medicines or preparations respectively.

Not to disclose secret to other persons.

3. The proprietor shall not at any time hereafter disclose or make known to any person or persons whomsoever the said receipt whereby the said medicines or preparations, or any of them, may be compounded or made up.

Not to compound medicines.

4. The proprietor shall not at any time hereafter, either by himself or by an agent or otherwise, make up or compound the aforesaid medicines or preparations, or any other of the same description, And shall not permit or allow the same or any of them to be made up or compounded by any person or persons whomsoever, under or by virtue of any license or authority by him the proprietor heretofore given or granted, or by him to be hereafter given or granted.

Purchasers to pay a moiety of profits to proprietor.

5. In consideration of the aforesaid articles the purchaser shall pay to the proprietor annually one moiety of the net profits arising from the sale of the aforesaid medicines or preparations during the term of twelve years, after which term the purchasers shall be entitled to hold the proprietorship of the said medicines and preparations without account.

To render account annually.

6. The purchaser shall, during the said term of twelve years, render to the proprietors annually, on the ——— day of ———, a statement and account of the sale of the said aforesaid medicines or preparations, together with the cost of preparing the same, and the cost of advertising and publish-

ing the same, whereby the net profit arising from the sale of the medicines or preparations may be ascertained.

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7. The expense of advertising and publishing the said medicines or preparations during the said term shall not be greater or otherwise than the sum to be agreed on between the purchaser and the proprietor by a memorandum in writing.

As to expenses of advertising.

8. Within fifteen days after the rendering the account mentioned in the sixth article, the purchaser shall pay to the proprietor the share or proportion of the net profit due to him on the said account.

Proprietor's share of profits to be paid within fifteen days after rendering account.

9. The proprietor shall not be entitled to call upon the purchaser to produce books in order to verify or prove the accounts to be rendered by him in pursuance of the sixth article, but the purchaser shall, if so required by the proprietor, verify the same by statutory declaration, and the accounts so rendered shall be taken and held correct.

Purchaser not to verify accounts.

IN WITNESS, &c.

XLVIII. *AGREEMENT for the* SALE *of* MACHINERY *by means of a* HIRING CONTRACT—*Repairs—Insurance—Option to Purchase for Gross Sum.*

AN AGREEMENT made the ——— day of ———, 18—, BETWEEN [*machinery manufacturer*], of &c., of the one part, and [*mill-owner*], of &c., of the other part, WITNESSETH, and the parties hereto mutually agree as follows, that is to say:—

Agreement to supply machinery.

1. In consideration of the payments hereby reserved, and of the performance of the conditions and stipulations hereinafter contained, and on the part of the said [*mill-owner*] to be performed, the said [*manufacturer*] will on or before the ——— day of ——— next, erect and place in the mills of the said [*mill-owner*], called the ——— Mills, situated at ——— in the county of ———, all the steam-engines, machinery, apparatus, and plant particularly described in the schedule hereunder written, and hereinafter called the said machinery.

2. The said [*mill-owner*] shall hold and be at liberty to use the said machinery as from the ——— day of ——— next,

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for the term of ——— years at the rent of £——— per annum, payable half-yearly on the ——— day of ——— and the ——— day of ——— in each year during the continuance of the said term, such payments making in the aggregate the sum of £——— [*the price of the machinery*], and the first of such payments to be made [in advance] on the ——— day of ——— next.

Repairs.

3. The said [*mill-owner*] shall, at his own expense, from time to time, and at all times during continuance of the said term, replace and make good all such parts of the said machinery as may be broken, worn out or damaged, and keep the same in a perfect state of repair, and in every respect in good working order; and he will not, during the said term, remove any part of the said machinery from the building where the same may be erected without first obtaining the consent in writing of the said [*manufacturer*] upon every such removal, nor assign, transfer, underlet, lend, or part with the possession of the same either directly or indirectly to any person or persons whomsoever.

Payment of rents, &c.

4. The said [*mill-owner*] will duly and punctually pay the said rents hereby reserved, and perform and observe all the conditions and stipulations herein contained, and on his part to be performed and observed; And also so long as the term hereby created is subsisting will duly and punctually pay the rent reserved by and perform and observe the covenants contained in the lease, under or by virtue whereof he now holds and occupies the said mill and premises at ——— aforesaid, and will from time to time, within ——— days after such last-mentioned rent shall become payable, produce to the said [*manufacturer*] the receipt for the last payment thereof; and will not do or suffer anything whereby the said machinery or any part thereof shall or may be distrained, seized, taken in execution, attached, removed, destroyed, or injured.

Insurance.

5. The said [*mill-owner*] shall, so long as the said machinery remains in or upon the said mill and premises, insure and keep insured the same against loss or damage by fire, in some respectable office, in at least the sum of £——— [*total price of machinery*], and will pay all premiums and other sums from time to time payable for keeping on foot every such insurance within ——— days after the first day on which it shall respectively become payable, and will forthwith deliver to the said [*manufacturer*] the policy or policies of such insur-

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ance, and also when required deliver to him the receipt for every premium and sum which shall become payable as aforesaid; and in default the said [*manufacturers*] may insure and keep insured all or any of the said machinery to the amount aforesaid, and may pay the premiums and all other sums (if any) which may become payable for keeping on foot such insurance and all expenses incurred in so doing; and the said [*mill-owner*] will repay to the said [*manufacturer*] all such premiums, sums, and expenses with interest thereon respectively at the rate of £——— per cent. per annum, from the time of the respective payments; And all moneys received in respect of any insurance of the said machinery shall forthwith be applied to replace or restore the same.

Manufacturer may mark machinery.

6. The said [*mill-owner*] shall allow the said [*manufacturer*] to mark the said machinery, or such parts thereof and in such manner as he the said [*manufacturer*] shall think fit, with his name engraved on plates or otherwise to distinguish the said machinery as his property.

Property in the machinery to remain in the manufacturer (*a*).

7. It is hereby expressly declared that the property in the said machinery shall, until the expiration of the said term, or sooner cesser thereof, by reason of the proviso herein con-

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Reputed ownership of bankrupt.

(*a*) By the 44th section of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), it is provided that the property of a bankrupt divisible among his creditors shall comprise, among other things,—

(iii.) "All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

Fixtures.

It has been decided that fixtures affixed to the freehold are not within the similar provisions of the earlier Bankruptcy Acts. See *Clark* v. *Crownshaw*, 3 B. & Ad. 804; see also *Ex parte Reynal*, 2 M. D. & De G. 443, where the principal cases bearing on this point are collected and discussed. "It is immaterial for this purpose whether the fixtures are such as would, as between real and personal representatives devolve upon the latter, or as between landlord and tenant would be removable by the tenant, or such as might be sold as goods and chattels under a writ of execution, or that the fixtures are trade fixtures put up by a mortgagor for the purposes of carrying on his trade:" Robson on Bankruptcy, p. 483; and see the cases there collected.

Chattels.

As regards goods and chattels not being fixtures, in the possession of a bankrupt with the consent of the true owner, the presumption as to their being in the reputed ownership of the

XLVIII. Sale of Machinery.

tained, remain in the said [*manufacturer*] to all intents and purposes: PROVIDED that the said machinery shall become

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bankrupt may be rebutted by showing that there is in a particular trade or business a custom so well established that the ordinary creditors of the bankrupt must be reasonably presumed to be aware of it, that the goods in question should be allowed to be in the possession of a person who is not the true owner. This principle has been upheld, as regards the purchase of pianofortes upon "the three years' hire system:" *Ex parte Hattersley*, 8 Ch. D. 601. Thus, where it was proved to be a custom well-known among persons concerned in the wine and spirit trade for goods sold in bond to remain in the possession of the vendors, it was held that the doctrine of reputed ownership was excluded: *Ex parte Watkins*, *Re Couston*, L. R., 8 Ch. 520. So, on the bankruptcy of an hotel keeper, where evidence was given of a custom for furniture dealers to supply their customers with furniture under contracts for purchase on the hire system, it was held that the evidence adduced was sufficient to support the custom as a matter of fact, and thereby rebut the presumption of ownership: *Ex parte Powell*, *Re Matthews* (C. A.), 1 Ch. D. 501. And in the case of *Crawcour* v. *Salter* (C. A.), 18 Ch. D. 30, it was held that the custom of hotel keepers of holding furniture on hire was so well established that the Court was bound to take judicial notice of it; but in *Ex parte Brooks*, *Re Fowler* (C. A.), 23 Ch. D. 261, it was held that the presumption as to ownership does not apply, in the absence of express evidence, to furniture hired by a private householder.

The occupation of a furnished house, or the hiring of horses on job, will not create a reputed ownership so as to render the furniture or horses liable to be seized: *Lingham* v. *Biggs*, 1 Bos. & P. at p. 88. See also, on this question, *Hickenbottom* v. *Groves*, 2 C. & P. 492; *Mullett* v. *Green*, 8 C. & P. 382; *Hamilton* v. *Bell*, 10 Ex. 101; *Priestley* v. *Pratt*, L. R., 2 Ex. 101; *Prismall* v. *Lovegrove*, 6 L. T. (N. S.) 329; *Ex parte Vaux*, L. R., 9 Ch. 602; *Ex parte Stooke*, 20 W. R. 925.

The validity of the clause of the agreement in the text will therefore, except in the case of fixtures, depend upon sufficient proof of there being in the district where the agreement is made an established custom for machinery to be supplied to mill-owners or others by manufacturers on the hire system.

Registration under Bills of Sale Acts.

The registration of an instrument as a bill of sale under the Bills of Sale Act, 1878, will also prevent property in the possession of a bankrupt from passing to the trustee, as being in the reputed ownership of the bankrupt; but having regard to the extreme stringency of the provisions of that Act, and the inconvenience, by the notoriety attending registration, care must be taken in drawing an agreement for the supply and sale of machinery, &c., to avoid bringing the instrument within the definition of a bill of sale within the meaning of the Bills of Sale Acts, 1878 and 1882, so as to require registration. It is conceived that the present agreement cannot possibly come within the definition of the Bills of Sale Act, because to make it a bill of sale

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the absolute property of the said [*mill-owner*] on the expiration of the said term and payment of all rent hereby covenanted to be paid, and all costs, charges, and expenses connected with this agreement or with such machinery, including legal expenses, and the costs of such insurance as aforesaid, or at the option of the said [*mill-owner*] upon the payment at any time before the expiration of the said term of ——— years of the said aggregate sum of £———, or of any unpaid part thereof, after giving credit to the said [*mill-owner*] for all previous payments by way of rent (if any) duly and regularly made by him under the stipulations herein contained, and also upon the payment of all such costs, charges, and expenses as aforesaid: PROVIDED ALSO that the said [*mill-owner*] shall be entitled to discount at the rate of £——— per cent. upon payment of the said aggregate sum or of any such unpaid part thereof as aforesaid.

Cesser of agreement on bankruptcy, &c. of mill-owner.

8. In case of the bankruptcy of the said [*mill-owner*], or if he shall enter into liquidation for the benefit of or compound with his creditors, or give a bill of sale, or if he shall make default in performing or observing any of the covenants, conditions or agreements herein contained and on his part to be performed and observed, the said aggregate sum of £——— shall become immediately payable to the said [*manufacturer*], and the said [*manufacturer*] may at his option enter upon the said mill and premises and into every building in which any part of the said machinery may then be, and seize upon and take possession of and remove the said machinery, and may, if he shall think proper, without any consent of the said [*mill-owner*], sell the same as freely as if this agreement had not been made.

Mill-owner to repay all expenses not covered by sale of machinery.

9. On the sale of the said machinery in such case as aforesaid, if the same shall not produce a sufficient sum to make up the said aggregate sum of £——— (allowing for the

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the mill-owner must have had some property in the machinery, but this he cannot have until all the instalments are paid. See remarks of *Jessel*, M. R., and *Brett*, L. J., in *Ex parte Crawcour* (C. A.), 9 Ch. D. 419; see also *Crawcour* v. *Salter*, 18 Ch. D. 30. See *post*, tit. MORTGAGES. If the person supplying the machinery is not sufficiently satisfied as to the solvency of the person to whom it is to be supplied, the execution of a bond may be required by a surety for the payment of the rent, and observance of the stipulations of the agreement. See *post*, tit. BONDS.

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payments of rent already made in respect thereof), as well as to cover such costs, charges, and expenses as aforesaid, the said [*manufacturer*] may sue the said [*mill-owner*], or may prove against his estate in bankruptcy for the balance necessary to make up the aggregate sum of £———, and to cover all such costs, charges, and expenses as aforesaid, and in case such sale shall produce more than sufficient to make up such aggregate sum and to cover all such costs, charges, and expenses, the said [*manufacturer*] will pay over such surplus expenses, if any, to the said [*mill-owner*].

10. The said [*mill-owner*] will duly and punctually pay the said rents hereby reserved, and perform and observe all the conditions and stipulations herein contained, and on his part to be performed and observed: And also so long as the term hereby created is subsisting will duly and punctually pay the rent reserved by, and perform and observe, the covenants contained in the lease under or by virtue whereof he now holds and occupies the said mill and premises at ——— aforesaid, and will from time to time within ——— days after such last-mentioned rent shall become payable, produce to the said [*manufacturer*] the receipt for the last payment thereof: and will not do or suffer anything whereby the said machinery or any part thereof shall or may be distrained, seized, taken in execution, attached, removed, destroyed or injured.

In witness, &c.

XLIX. *AGREEMENT for the* Sale *of a* Pianoforte *on the Three Years* Hire System. *In case of Default, all Instalments paid to be forfeited* (*a*).

THE undersigned hereby hires the ——— pianoforte, Class ——— No. ——— belonging to Messrs. ——— & Co., of &c., upon the terms and conditions following:—

1. On the sum of £——— being paid to Messrs. ——— &

(*a*) This precedent is taken by permission of the proprietors of the Music Trade Review from a form of agreement originally drawn by Lord Coleridge, when at the bar, and settled in 1879 on behalf of the proprietors of the Review by Sir H. Giffard, then Solicitor-General, who gave his opinion that the agreement

XLIX. Sale of Piano on Hire System.

Co., in ——— instalments of £——— each, the first instalment to be paid on the ——— day of ——— next, and each subsequent instalment at the expiration of each succeeding three months, the pianoforte to belong without further payment to the undersigned.

2. In case of default in the punctual payment of any instalment, or in case the piano shall be removed without the consent in writing of Messrs. ——— & Co., or in case the hirer shall become bankrupt, or go into liquidation, or compound with his creditors, the instalments previously paid shall be forfeited to Messrs. ——— & Co., who shall thereupon be entitled to resume possession of the instrument, the understanding being that until full payment of the said sum of £———, the pianoforte remains the sole and absolute property of Messrs. ——— & Co., and is only lent on hire to the undersigned, who will take all reasonable care of it during the hiring, and in case of damage by fire or otherwise, bear the loss or risk.

Dated this ——— day of ——— 18—.

[*Signature of Hirer*].

WITNESS A. B.

L. *AGREEMENT for the* SALE *of a* REVERSIONARY INTEREST *in Stock to the Trustees of a Reversionary Interest Company.*

MEMORANDUM OF AGREEMENT made the ——— day of ———, 18—, BETWEEN [*vendor*], of &c., of the one part, and [*trustee*], of &c., and [*trustee*], of &c., of the other part. Parties.

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as settled by him was not liable to be registered as a bill of sale under the Bills of Sale Act, 1878 (40 & 41 Vict. c. 31); see also *Ex parte Hattersley*, 8 Ch. D. 601; *Ex parte Crawcour*, (C. A.) 9 Ch. D. 419; *Crawcour* v. *Salter*, 18 Ch. D. 30. By sect. 4 of the Bills of Sale Act, 1878, Amendment Act, 1882 (45 & 46 Vict. c. 43), the expression "bill of sale" in that Act is to have the same meaning as in the principal Act. A somewhat similar form of agreement for the purchase of a sewing machine on the hire system will be found in *Singer Manufacturing Co.*, v. *Clark*, 5 Ex. D. 37.

The subject of the registration of bills of sale will be fully treated in a subsequent volume of this work, sub. tit. MORTGAGES.

As to reputed ownership, see *ante*, p. 631, note (*a*).

L. Sale of Reversionary Interest in Stock.

Recitals.

WHEREAS the said [*trustee*] and [*trustee*] are trustees for "the ——— Reversionary Interest Company" but enter into this agreement personally, to the intent that they, and not the company, may be bound hereby, and that they the said trustees may be parties to sue and to be sued herein: AND WHEREAS the said [*vendor*] hereby represents that he is absolutely entitled, free from incumbrances, under the will dated the ——— day of ———, 18—, and proved in the Principal Registry of the Probate Division on the ——— day of ———, 18—, of [*testator*], late of ——— in the county of ———, deceased, in reversion expectant on the decease of [*tenant for life*] to one equal ——— part or share of and in the sum of £———, 3*l.* per cent. Consolidated Bank Annuities, and of and in the sum of £——— debenture stock of the ——— Railway Company respectively standing in the names of [*trustees of will*] and now constituting or representing the residuary estate of the said [*testator*]. NOW THESE PRESENTS WITNESS, and it is hereby agreed as follows:—

Agreement for sale and purchase of reversion.

1. The vendor shall sell to the said company, and the trustees on behalf of the said company shall purchase from the said [*vendor*], the said reversionary one equal ——— part or share of and in the said trust premises, free from succession duty and all incumbrances, at or for the price or sum of £——— (*b*).

2. The vendor shall also pay all costs, charges and expenses of and attending and relating to the investigation of the title and of and attending and in relation to all deeds, statements and writings requisite for carrying into effect and completing the said sale and purchase.

3. The said trustees shall be entitled to the said reversionary part or share from the date hereof.

4. The vendor shall within ten days from the date hereof deliver to the said trustees or to ———, of &c., their solicitor, an abstract, and within two calendar months from the delivery of such abstract to deduce and show a good title to the said reversionary part or share, and to make and exe-

(*b*) In the absence of stipulation to the contrary the purchaser of a reversion is liable to pay the succession duty: *Cooper* v. *Trewby*, 28 Beav. 194. The usual course is for the amount of the succession duty, calculated according to actuarial tables with reference to the age of the tenant for life, to be deducted from the purchase-money.

L. Sale of Reversionary Interest in Stock.

cute such assignment or assurance thereof as will be satisfactory to the said solicitor.

5. If the title and evidence supplied in support thereof shall not be deemed sufficient by the said solicitor, or if the said [*vendor*] shall neglect to procure and deliver to the same solicitor the evidence and information which may be required by him to establish, make out and verify such title, or shall neglect or refuse to execute such assignment or assurance as the same solicitor shall or may require, then the said trustees shall not be any further bound by this agreement. And the said [*vendor*] in that case hereby agrees to pay to the said trustees the full amount of all the reasonable and proper costs, charges, fees and expenses which shall or may be incurred or paid by the said trustees in and about investigating the said title, and considering the sufficiency of the same, and preparing such assignments and assurances for completing the same sale and purchase, or otherwise in relation thereto, in pursuance of these presents.

6. It is hereby expressly agreed that time shall be of the essence of the contract for all the purposes of these presents (*c*). And that the death of the said [*tenant for life*] before the said ——— day of ———, 18—, shall not affect this agreement.

As witness, &c.

LI. *AGREEMENT for the* Construction *of a* Steamship.

AN AGREEMENT made the ——— day of ———, 18—, Between [*shipbuilders*], of &c., of the one part, and the ——— Steamship Company, Limited, having registered offices at ——— of the other part. Whereby it is agreed as follows:—

Interpretation clause.

1. In this agreement the term "the contractors" means the said [*shipbuilders*], and the survivor of them, their or his executors or administrators and assigns; the term "the company" means the said ——— Steamship Company, Limited, their successors and assigns; the term "the parties" includes the contractors and the company; the term "the specifications" means the detailed specifications, plans, and drawings marked A., B., C., D., and E., and signed by ——— on behalf of the contractors, and by [*company's engineer*], on behalf

(*c*) See as to this, *ante*, p. 406, note (*h*).

LI. Steamship, Construction of.

of the company; and the term "the engineer" includes the said [*company's engineer*], and any other the consulting engineer for the time being of the company, and any duly-qualified deputy-engineer whom the said [*company's engineer*], or other such consulting engineer as aforesaid, shall appoint; AND the said company's engineer and any other consulting engineer for the time being of the company is accordingly hereby authorized from time to time to appoint and in his discretion to remove a deputy-engineer as and when he shall think proper; PROVIDED ALWAYS that the secretary of the company shall notify in writing to the contractors the appointment or removal of any such consulting or deputy-engineer as aforesaid not less than ——— days thereafter.

Contractors to build and equip steamer.

2. The contractors shall build, equip, and completely finish for, and deliver at the time and place hereinafter mentioned to the company, a steamship, for the purpose of passenger and goods traffic between ——— and ———, with proper and suitable engines, machinery, rigging, fittings, and equipment, according to the specifications.

Character of steamship.

3. The said steamship shall be built and equipped in all particulars according to the requirements of the specifications, with such additions, alterations, and omissions only (if any) as may be made in accordance with the stipulations herein contained; and the whole of the materials and workmanship shall be of the best quality and description, and such as is in accordance with Lloyd's Rules, and such as to entitle the said steamship to be classed A——— in Lloyd's Registry.

Steamship, &c. to become forthwith the property of the company (*d*).

4. The said steamship shall, from and after the execution of this agreement, and all the engines, machinery, fittings, and materials intended for the construction or equipment of the said steamship shall, from and after their respective appropriation for such purposes, become and continue to be the absolute property of the company, but shall until the completion and delivery of the said steamship as aforesaid be at the risk of the contractors, who shall make good all damage which may happen to the said steamship, engines, machinery,

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(*d*) This clause is intended to take the unfinished ship out of the order and disposition of the contractors in case of their bankruptcy. See, on this point, *Wood* v. *Bell*, 6 E. & B. 355; *Wood* v. *Russell*, 5 B. & A. 942; *Ex parte Lambton*, L. R., 10 Ch. 405; *McBain* v. *Wallace*, 6 App. Cas. 588. See *Ex parte Hodgkin*, L. R., 20 Eq. 746, as to how far an unfinished ship is within the Bills of Sale Acts: see also *infra*, tit. MORTGAGES.

fittings, or materials by fire or otherwise. The contractors shall immediately upon the execution of this agreement [*or, if the work has not been commenced*, so soon as the keel shall have been laid], mark the said steamship as belonging to the company, conspicuously, by painting thereon or affixing thereto, and keeping so painted or affixed, the style or name of the company; and so soon as the said steamship shall have been launched, the company shall be duly registered as the owners thereof. LI. Steamship, Construction of.

5. All drawings, plans, and estimates which shall from time to time be prepared by the contractors for the purposes of the construction and equipment of the said steamship and its appurtenances shall be submitted to the engineer for his approval, and shall not be used unless and until initialled by him in token of such approval. Drawings, &c. to be submitted to engineer.

6. The whole of the work shall be executed under the supervision of the engineer, who shall at all times during the progress of the work have full liberty of access to the said steamship to survey and examine the same and the materials used or intended to be used in the construction and equipment thereof, and to test all such materials as he shall think proper, and to reject such as he shall find not to be in accordance with the specifications or with the stipulations herein contained, and thereupon the contractors shall, at their own expense, remove the materials so rejected and replace the same with others of proper quality. Work to be done under his supervision.

7. The said steamship shall be tried at sea as often as the engineer shall think advisable, and the contractors shall at their own expense furnish and supply the crew, and all fuel and other things necessary for such trials, and also pay all expenses of the marine insurance; the engineer and any of the directors of the company and any other persons authorized in writing by the secretary of the company may attend every such trial as aforesaid on board the said steamship, and the steamship shall not be deemed to have been completed, nor shall it be delivered, until the engineer has certified in writing that a final satisfactory trial thereof has taken place. Trials at sea.

8. If the company or the engineer shall desire to make any addition, or alteration to, or omission from the works hereby agreed to be executed, or to have any extra work executed thereon or in relation thereto, notice of such addition, alteration, omission, or extra work, together with instructions for Extra work, alterations, &c.

LI. Steamship, Construction of.

the execution of the works in accordance therewith shall be given to the contractors in writing signed by the engineer, and thereupon the contractors shall execute the works in accordance with such notice and instructions, and upon terms as to prices and otherwise to be mutually agreed upon between the parties in writing: PROVIDED ALWAYS that the contractors shall not be deemed to have any authority to make any such addition, alteration, or omission as aforesaid, nor to make any claim or demand for the value thereof, or otherwise in regard to the same, until such notice and instructions shall have been received by them as aforesaid.

Contract not to be assigned.

9. The contractors shall not, without the previous consent in writing of the engineer, make any sub-contract with regard to the work hereby agreed to be done, nor assign nor sublet this contract or any part thereof.

Provision in case of bankruptcy or default of contractors.

10. If at any time before the completion of the said steamship the contractors shall become bankrupt, or enter into any arrangements for composition with their creditors, or shall make default in building, equipping, or completing the said steamship in accordance with the stipulations herein contained, or shall in the opinion of the engineer be guilty of any unreasonable delay in carrying out the works hereby agreed to be executed, then and in any such case it shall be lawful for the company to enter into and upon the building yard of the contractors, and to take possession of the said steamship in its then state, and of all engines, machinery, fittings, and materials intended and appropriated for the purposes of the same, and either themselves to complete, or employ any other person or persons whom they shall think fit to complete, the said steamship; or at their option, and in their absolute discretion, to sell the said steamship, engines, machinery, fittings, and materials, and to apply the proceeds of such sale in or towards repayment of all sums paid by the company to the contractors under or by virtue of their agreement, and of all expenses and losses incurred by the company by reason of such bankruptcy, insolvency, default, or delay as aforesaid or otherwise in relation to the said steamship: PROVIDED ALWAYS that the company shall be entitled to claim, or prove in bankruptcy or otherwise, for damages for any loss or injury so incurred by them as aforesaid, and which shall not be covered by the proceeds of any such sale as aforesaid.

Delivery of

11. The contractors shall deliver to the company the

LI. Steamship, Construction of.

said steamship complete for sea in all respects as aforesaid, according to the said specifications, afloat and safely moored at ———, and classed at Lloyd's as aforesaid, on or before the ——— day of ———, 18—; or otherwise the said contractors shall pay to the company the sum of £ ——— by way of liquidated damages, and not of penalty, for each and every day after the said ——— day of ———, during which the said steamship shall remain not delivered as aforesaid.

steamship to the company.

Extension of time.

12. The contractors shall not be entitled to any extension of the time mentioned in the 11th article of this agreement by reason of any addition or alteration or extra work whatsoever, unless a certificate by the engineer shall be included in or appended to such notice and instructions as aforesaid extending the time for the completion and delivery of the said steamship, and in such case the time shall be extended only till such date as is mentioned in such certificate.

Payment.

13. The price and consideration for the said steamship to be built, equipped, completed, and delivered according to the stipulations herein contained shall be the sum of £———, and shall be paid by the company to the contractors at the times and in manner following, that is to say:—one instalment or sum of £——— upon the execution of this agreement; a further instalment or sum of £——— so soon as the engineer shall have given his certificate in writing that the said steamship is in frame, and that the work up to that point has been executed in accordance with the stipulations herein contained, and to his satisfaction in all respects; a further instalment or sum of £——— so soon as the engineer shall have given his certificate in writing that the plating is complete, the deck laid, and the engines and machinery on board, and that the work up to that point has been executed in accordance with the stipulations herein contained, and to his satisfaction in all respects, and the last instalment or balance of £——— when the engineer shall have given his certificate in writing that the said steamship has been safely launched and classed at Lloyd's as aforesaid, and has been finally tried at sea to his entire satisfaction, in accordance with the stipulations herein contained and the said specifications, and that the said steamship is built and equipped and completed in respect of materials and work and in all other respects to the satisfaction of the engineer, and the said

LI. Steamship, Construction of.

contractors shall have delivered the said steamship afloat and safely moored at ——— aforesaid.

Arbitration clause.

14. If any dispute shall arise between the contractors and the company touching anything contained in this agreement or in the specifications, or in any way touching the building, equipping, furnishing, completing or delivery of the said steamship, the same shall be referred to the engineer [*or* to a competent engineer, to be agreed upon between the parties, or in case of difference to be nominated by the president for the time being of the Institute of Civil Engineers], whose decision shall be final.

COPY OF SPECIFICATIONS, &c.

LII. *AGREEMENT for* CONDUCTING *an* UNDERWRITING BUSINESS *at Lloyd's or elsewhere through an Agent.*

Parties

MEMORANDUM OF AGREEMENT made the ——— day of ———, 18—, BETWEEN A. B., of &c., underwriter, of the one part, and C. D., of &c., underwriter, of the other part.

Recitals of proposed arrangement.

WHEREAS the said A. B. is desirous of carrying on the business of an underwriter at Lloyd's aforesaid. AND WHEREAS the said C. D. hath agreed to act as agent of the said A. B. and underwrite policies of insurance in the name, and at the sole risk, of the said A. B.

Agreement.

NOW THEREFORE IT IS AGREED between the parties hereto, that the said underwriting business shall be carried on upon the terms and conditions hereinafter mentioned, that is to say:—

Conduct of business.

1. The underwriting account shall commence on the ——— day of ———, 18—, and shall be carried on in the name and at the sole risk of the said A. B., and the subscriptions to policies shall be made in his name, but the policies, losses and averages shall be subscribed and settled by the said C. D. as the agent of the said A. B.

Commencement and duration of agreement. Power to determine by notice.

2. The business shall commence from the ——— day of ———, 18—, and shall be continued from year to year, unless such notice be given as is hereinafter provided: PROVIDED ALWAYS that it shall be lawful for either party to

LII. Underwriting Agreement.

determine the said business by a notice in writing to the other party, such notice to be left for him at his place of business at Lloyd's aforesaid, and the business shall be determined ——— months from the date of giving or leaving such notice, and the accounts thereof shall be settled and closed from such date, unless such notice shall have been given in consequence of the mental or physical incapacity or wilful negligence of the said C. D., in which case the business shall be determined from the time of giving or leaving such notice.

Books of account to be kept.

3. The usual and proper books of accounts shall be kept, in which entries shall be made of all such matters, transactions and things, as are usually entered in books of account kept by persons engaged in business of the same kind.

Both parties to have access thereto.

4. The books of account, together with all securities, letters and other things, which from time to time concern the said business, shall remain and be kept at such place as may be mutually agreed on, and each of the parties hereto shall have free access to examine, cast up, and copy the same, without any hindrance from the other.

Receipt of premiums, &c.

5. The premiums and money arising from the business shall be received by the said C. D., and be paid by him to an account to be opened in the name of the said A. B., at the Bank of ———, or at such other bank as may at any time be mutually agreed on, and shall be applied to the purposes of the business by the said C. D.; any surplus moneys which may be received and which from time to time, in the opinion of the said A. B. and C. D. may be not required for the purposes of the business, may be deposited at interest in the joint names of the said A. B. and C. D., or otherwise invested, as may be mutually agreed on. And all interest and dividends arising in each year from such deposits or investments, and the profits, if any, arising upon the realization of such investments, shall be considered as part of the profits of the business in such year, but dividends or interest accruing due in January in any year, shall be considered as having become due in the preceding December. PROVIDED ALWAYS that no profit which may have accrued upon any investment shall be deemed a part of the profit of the business, unless the said investment be actually realized.

Office expenses.

6. The said A. B. shall pay towards the office expenses of the business, including rent, the yearly sum of £———.

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Agent not to be a partner.

7. The said C. D. shall not in any way be considered as a partner with the said A. B. in the business, and in case a loss shall arise from the transactions of any year, the said A. B. shall alone bear and pay such loss, and the said C. D. shall (subject to the proviso contained in the tenth clause) be entirely exempted from bearing or paying any part or proportion thereof, and shall be indemnified by the said A. B. against the same. The profits of the business shall belong to the said A. B.

Taking of accounts.

8. The accounts of the business shall be made up on the 31st December in each year, or as soon as conveniently may be, for ascertaining the profit and loss to each respective period, and on the expiration of three years from the date of each yearly account the said A. B. shall, after deducting all office expenses, salaries, and other outgoings incident to the said business, pay to the said C. D., as a remuneration for his services, a sum of money which may be equal to 20 per cent. of the net profits (if any) which shall appear on such account, and in computing such sum the profit and losses in each year shall be absolutely independent of every other year, and shall be borne and divided without regard to the account of any other year.

Suspense and indemnity fund.

9. At each period appointed for the taking by the said A. B. of the profits, the said C. D. may set apart so much of the said profits as he shall think fit to form a suspense account and indemnity against further payments which may come against such profits, such account to be kept open until the final settlement of account between the parties.

Unexpected claims.

10. PROVIDED ALWAYS that if at any time after the settlement of any yearly account any unexpected or other claim shall be made upon the said parties or either of them in respect of the business included in such account, £ ——— per cent. of such claim shall be paid by the said A. B., and £ ——— per cent. by the said C. D., or the same shall be taken out of the suspense account; PROVIDED NEVERTHELESS that the said C. D. shall not be required to pay on account of any such claim any greater sum of money in the whole than the amount which he shall have previously received on account of profits as remuneration from the said A. B. for the year in which the business in respect of which the claim is made was transacted.

LII. Underwriting Agreement.

11. In the event of the death of the said A. B. during the continuance of this agreement, the said C. D. shall forthwith wind up the said business, and the profits thereof (if any) shall (subject to the proviso contained in the eighth clause), at the expiration of three years from the death of the said A. B., be paid to his personal representatives. The said C. D. shall receive the sum of £——— for his trouble in winding up the said business, the same to be paid him out of the profits of the said business (if any) ——— months from the death of the said A. B., and to be irrespective of any remuneration to which he may be entitled under this agreement.

Business to be wound up on death of principal, A.B.

12. The said C. D. shall be at liberty to write for other persons besides the said A. B., but he shall devote a fair proportion of his time to the said business.

Liberty for agent to write for others.

13. The said A. B. shall pay to the said C. D. as a further remuneration for his service in carrying on the said business the yearly sum of £———, such sum to be entirely independent of and not to be taken into account at the time of any division of profits of the said business, or to be affected by any loss or unexpected or other claim which may at any time happen or be made in the conduct of the said business; the payment of such sum of £——— to be made quarterly, and to commence from the ——— day of ——— 18—, and to cease from the date of the determination of the said business, or the death of the said A. B., which shall first happen.

Remuneration of agent.

14. Provided always that in case of the death of the said C. D. between any two quarter-days then the proportion of the sum of £—— as may be then due and owing to the said C. D. shall be calculated from day to day, and the proportion that may be found due together with any arrears shall be paid to his personal representatives.

Proportion payable in case of death.

15. In case any difference or dispute shall arise between the said parties hereto or their respective executors or administrators, respecting this agreement or any matter to arise from or relating to the said underwriting business, or the conduct of either party therein, the same shall be left to the arbitration of two arbitrators, one of them to be chosen by the said A. B. and the other by the said C. D., and the two so chosen to choose a third, and the award of the said arbitrators or any two of them shall be binding and conclusive on the said

Arbitration clause.

LII. Underwriting Agreement.

parties and their respective executors, administrators, and assigns, and every or any such submission to arbitration, and any award or awards to be made in pursuance thereof, shall and may at the instance of either of them, the said parties hereto, his executors, administrators or assigns, be made a rule or rules of her Majesty's High Court of Justice pursuant to the statute in that behalf.

As witness, &c.

Note.—For Agreements for Reference of Disputes, see tit. Arbitration.

For Agreements for Leases, see tit. Leases.

For Agreements for Mortgages, see Mortgages.

Numerous clauses will also be found sub. tit. Conditions of Sale, which may easily be adapted to the purposes of agreements for sale of lands, &c., by private contract.

ANNUITIES.

PRELIMINARY DISSERTATION.

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Definition of a personal annuity.

An annuity, in the strict technical acceptation of the word, is defined by Lord *Coke* to be a yearly (*a*) payment of a certain sum of money granted to another in fee, for life, or for years, charging the person of the grantor only; Co. Litt. 144 b; and not made as interest for a debt: *Winter* v. *Mouseley*, 2 B. & Al. 802; *Ex parte Brocklis*, Buck, 406.

Distinction between a rent-charge and a rent seck.

If a man, seised of land, grant a yearly rent, to be issuing out of the land to another in fee, or in tail, or for term of life, &c., with a clause of distress, &c., it is a rent-charge; but if the grant be without a clause of distress, then it is a rent seck, or a dry rent, for which, before 4 Geo. 2, c. 28, s. 5, no distress was incident: Co. Litt. 144 a; Gilb. Rents, 38; Noy's Max. 40, 5th ed.; 132, 9th ed. See as to rents seck, *infra*, tit. LEASES.

How granted.

An annuity cannot be granted *inter vivos* without deed; and there must be present and distinct words

(*a*) If the payments are to be made at regular consecutive periods, whether of greater or less extent than a year, it is an annuity: *Anon.*, Dyer, 24; Roll. Abr. *Annuity*, where a payment at intervals of twenty years is said to have been held an annuity.

Nature and Incidents of Annuities in general.

of grant even in an instrument under seal to create an annuity; an agreement to grant is not sufficient: Co. Litt. 144 b; *Nield* v. *Smith*, 14 Ves. 491; *In re Locke*, 2 Dowl. & Ry. 603. As an annuity cannot be granted, so it cannot be released, without deed: *Cupit* v. *Jackson*, M'Clel. 495; *S. C.*, 13 Price, 721.

When both the person and estate are charged, it is termed an annuity.

If both the person and the estate be made liable, as they most commonly are, then it is generally called an annuity: whether the one or the other shall be liable, is in the election of the grantee; which election, when once distinctly made, is final and conclusive: Co. Litt. 144 b; 1 Bac. Abr. 177, Gwill. ed., *Annuity*.

Thus, says *Littleton*, "if a man grant by his deed a rent-charge to another, and the rent be behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distrain for the rent behind, and the distress detain until he be paid. But he cannot do or have them both together, &c.; for, if he recover by a writ of annuity, then the land is discharged of the distress, &c.; and if he do not sue a writ of annuity, but distrain for the arrears, and the tenant sue his replevin, and then the grantee avow the taking of the distress in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity:" Co. Litt. 144 a; Roll. Abr. *Annuitie*, F.; 2 Sand. Uses, 250; *Bodwell* v. *Bodwell*, Cr. Car. 171. See also *Brown* v. *Claxton*, 3 Sim. 225.

This election of the grantee to convert an annuity into a rent-charge, and a rent-charge into an annuity, by the application of his remedy, shows that every rent-charge is properly an annuity, though every annuity be not a rent-charge; until by such determination in the choice of the remedy, the grantee may have made it *personal* by charging the person of the grantor, or *real*, by distraining on his land.

Although rent cannot be granted out of an incorporeal inheritance, yet it will be good as a contract.

A rent, in the strict acceptation of the word, cannot be granted to a subject, *Mountjoy's case*, 5 Rep. 5, out of an incorporeal inheritance, such as a rent, a common, an advowson, a fishery, an office, a corrody, the mulcture of a mill, tithes, fairs, markets, liberties, privileges, franchises, and the like; but only

out of lands or tenements whereunto the grantee may have recourse to distrain, or which may be put in view to the recognitors of an assize: Bro. Abr. *Assize*, pl. 2; Co. Litt. 144 a; *Talentine* v. *Dentor*, Cro. Jac. 111; *Rickman* v. *Garth*, Ibid. 173. Yet such a grant will bind the grantor by way of contract, but the grantee cannot distrain: Co. Litt. 47 a; *Dean and Chapter of Windsor* v. *Gover*, 2 Saund. 302; *Bally* v. *Wells*, 3 Wils. 25. But the Queen may by her prerogative distrain all the lands of her lessee for a rent reserved out of an incorporeal hereditament: Co. Litt. 142 a; Gilb. Rents, 20 (*b*). See further *infra*, tit. LEASES.

Nature and Incidents of Annuities in general.

If a man grant an annuity to another and his heirs, without saying *for himself and his heirs*, it shall determine by the death of the grantor (*c*); although he may so grant a rent out of land, or a rent-charge, of which he is seised; for the rent charges the land, and the annuity the person only: Bro. Abr. *Charge*, pl. 54; and *Estates*, pl. 65. So, if a rent-charge be granted to a man and his heirs, he shall not have a writ of annuity against the heir of the grantor, although he has assets, unless the grant be for him and his heirs: Co. Litt. 144 b. The reason is, because our law presumes that it is not intended to include the heir in the obligation, when he is not named; and consequently, in the case supposed by Lord *Coke*, it is too late to elect to make the rent-charge an annuity after the death of the grantor: see Co. Litt. 383 b, 384 b, 386 a; 10 Co. 128 a; 2 Vin. Abr. 505, *Annuity* (B). It would be the same, though the grantor should by his deed oblige himself and his heirs to warrant the annuity to the grantee and his heirs; for this does not enlarge the grant; *car garanty ne poit amender un estate:* Plowd. Ann. 236. In *Bodwell* v. *Bodwell*, Cro. Car. 171, the Court held, that an annuity which charges the

Heirs not bound, unless named in the grant.

(*b*) As to the remedy for a rent-charge upon rates, granted by a quorum of commissioners under a local Act, see *Cane* v. *Chapman*, 1 Nev. & P. 104.

(*c*) The words "in fee simple" without the word "heirs" are now sufficient to pass the fee in an incorporeal hereditament. See 44 & 45 Vict. c. 41, sects. 2 (ii), 51.

Nature and Incidents of Annuities in general.

person who grants it, though with a clause of distress, not being granted *for himself and his heirs*, until election made and a distress taken, is merely personal; and therefore that a release of actions personal is clearly a bar.

Successors of bodies politic bound without being named.

But this reasoning fails in application if the grantor of the annuity be a body politic, and as such has perpetual continuance: Harg. n. Co. Litt. 144 b (2). So it was adjudged in *Sir Thomas Wroth's case*, Plowd. 457, that, although the king had granted to him an annuity without saying in the patent *for his heirs and successors*, yet that it would bind his successors; for he granted it as king in his political capacity, which is perpetual, and never dies, but has continuance in his successor.

A void rent-charge may be a good annuity.

Where a person intending to grant a rent does it in such a manner as to be void as a rent, yet it shall be generally good as an annuity; as, if the land out of which it is to be issuing do not belong to the grantor; the fund with which it is charged be insufficient; the person directed to pay it be misnamed; or the sources out of which it is to arise be uncertain, precarious, or imaginary. See Br. Ab. *Grauntes*, pl. 4; 2 Vin. Abr. 507 (E).

Annuities apportionable according to income.

Where an annuity is payable out of two separate properties, such properties must contribute in proportion to their annual income *de anno in annum*, and not in proportion to their capitalised value: *Ley* v. *Ley*, L. R., 6 Eq. 174.

Creation of rents by way of use.

Creation of Rents by way of Use.]—Before the Statute of Uses, a rent might be newly created by bargain and sale; because, when the money, as an equivalent, was given, and ceremonies or words of law were wanting, the Chancery supplied them; therefore this was good to pass the estate, without any words of granting.

Rent by way of use.

But, since the statute, a rent cannot be newly created by bargain and sale, because there ought to be a freehold in some other person to be executed in *cestui que use;* but there can be no seisin of this rent in the bargainor, because no man can be seised of a rent in his own land; and, consequently, there

can be no estate to be executed in the bargainee: *Chudleigh's case*, 1 Rep. 127 a; Gilb. Uses, 86, 281, 287.

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The statute has two provisions for the execution of rents: the first for rents *in esse* limited to uses, or created *de novo* to uses, which are executed in the same manner as uses of corporeal hereditaments; 27 Hen. 8, c. 10, s. 1; the other, for rents limited in use out of the seisin in the land of some other person *ex gratiâ*, where any person stands seized of any lands to the use that some other person may receive a rent thereout, which the statute executes in the same manner as if a sufficient grant had been made to him by the person seised to the use, and gives the *cestui que use* a power of distress: 27 Hen. 8, c. 10, ss. 4, 5. This clause, it has been held, relates as well to rents limited since the statute, as to rents then *in esse;* Dyer, 362 b, pl. 21; *Danby* v. *Conyers*, 1 And. 51; Bendl. 315, pl. 299; *Rivett* v. *Godson*, Sir W. Jones, 179; therefore, if lands be conveyed to A. and his heirs, to the use that B. and his heirs may receive a given rent, the use will be executed by the statute: Sug. Gilb. Uses, 193. But, if lands are conveyed to A. and his heirs, to the use, intent, and purpose that B. and his heirs may receive a rent, with a declaration that B. and his heirs shall stand seised of the rent to the use of C. for life, with remainder over, the rent is executed in B., and then C. and the remaindermen take only the trust of the rent: *Chaplin* v. *Chaplin*, 3 P. Wms. 229, 231; Butl. n. Co. Litt. 271 b, VII. 3.

Rents pur autre vie.]—By the stat. 7 Will. 4 & 1 Vict. c. 26, s. 6, it is enacted:—

Rents pur autre vie. 7 Will. 4 & 1 Vict. c. 26, s. 6.

"That, if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold lands in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had

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the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

The statute renders estates *pur autre vie* in copyholds transmissible in default of special occupancy to personal representatives, and chargeable and distributable in all respects as personal estate.

Rent pur autre vie, without words of limitation, held to belong to personal representative.

Bearpark v. *Hutchinson.*

The long-debated question, whether a rent granted *pur autre vie*, without words of limitation, belonged to the executor or administrator under the Statute of Frauds (or rather now under the Wills Act), or becomes extinguished, for the benefit of the owner of the land, was decided in the case of *Bearpark* v. *Hutchinson*, 4 Moo. & P. 848; 7 Bing. 178, which was an action of replevin to a distress levied by the administrator of the owner of a yearly rent-charge of 60*l.*, which was granted to the intestate (without words of limitation), *during the life of B.*, who was yet living. It was held, that the rent had not ceased, and therefore that the distress could be sustained.

Personal annuities and annuities or rents charged on terms of years, pur autre vie.

Of course it was never thought that there was any objection to the grant of a personal annuity to the grantee, his executors, administrators, and assigns, *pur autre vie*, because it is not a freehold, but only a chattel: *Savery* v. *Dyer*, Ambl. 139; *S. C.*, 1 Dick. 162. However, when it is granted with words of inheritance, it is descendible to the heir, and the property itself is so far real, although it is personal only as to the security and the remedy: *Turner* v. *Turner*, 1 Bro. C. C. 376; *Holdernesse* v. *Carmarthen*, Ib. 377; *Stafford* v. *Buckley*, 2 Ves. sen. 170. As to an entail of such an annuity, see *Buckeridge* v. *Ingram*, 2 Ves. jun. 652, 663. So there was no objection to the grant of an annuity or rent-charge to the grantee, his executors, administrators, and assigns, *pur autre vie*, out of a term for years; for, as the grant is good for so many years as the term continues, *St. Auby's case*, Cro. Eliz. 183, it is in effect only a grant for years determinable on lives;

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and it is only a chattel, because a freehold rent cannot issue out of a term for years: *Butt's case*, 7 Co. Rep. 25 a, *infra*. And it has been held, if a man possessed of a lease for years grant a rent out of it generally, without limiting any estate, this shall be during all the term, and is not determinable by the death of the grantee: 1 Roll. Abr. 831, pl. 5; 10 Vin. Ab. 219, pl. 5. So, where a man possessed of a term for years determinable on lives, devised twenty pounds per annum to J. S., to be paid half-yearly out of this estate, if the *cestui que vies* should so long live: J. S., dying in the lifetime of the *cestui que vies*, and the question being, whether this rent should determine by his death, or go to the plaintiff, who was his executor, and be paid to him during the term, the Lord Chancellor decreed it for the plaintiff: *Gifford* v. *Goldsey*, 2 Vern. 35.

Bequest of annuity.

A personal annuity of inheritance will pass under a general bequest of personal property: *Aubin* v. *Daly*, 4 B. & Al. 59.

A rent-charge pur autre vie, limited to the grantee and his heirs, will on intestacy belong to them.

Mr. Preston says: "Annuities, by way of rent-charge, are frequently granted to a person and his *heirs* for a life or lives, instead of being granted for *years*, determinable with the decease of a person, or the decease of the survivor of several persons. When such annuity is derived out of, and depends on, *a freehold interest*, the annuity will, on intestacy, be transmissible and belong to *heirs*, and not to *executors* or administrators: at least such is the opinion entertained on mature deliberation. But every annuity granted out of a chattel interest will be a *chattel interest*, although it be limited to the grantee and his heirs for a *life or lives*. An interest which in its nature is a chattel *real* cannot be rendered transmissible to heirs:" 1 Prest. Abs. 446; Co. Litt. 388 a; 1 Com. Dig. 244, s. 35; and see *Butt's case*, 7 Rep. 23 a.

An annuity out of a chattel real limited to heirs, will belong to the executors.

Personal annuity limited to grantee and his heirs, &c.

But a personal annuity, that is, where it is not charged on lands, but only secured by grant, bond, or covenant, or bequeathed by will, may be limited to a man and his heirs in fee, *Smith* v. *Pybus*, 9 Ves. 574, or *quasi* in tail, as a fee simple conditional at common law, to become absolute and alienable on

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having issue; an annuity, in the proper sense of the word, not being within the Statute *De Donis*, and consequently of it, there can be no remainder limited: *Turner* v. *Turner*, 1 Br. C. C. 317, 319, 324; *S. C.*, Ambl. 776, 782. Or such a personal annuity may be limited to a man and his heirs *pur autre vie: Savery* v. *Dyer*, Ambl. 139. And in all these cases the personal annuity may be aliened either by the ancestor or his heir; or by husband and wife, entitled to it in right of the wife; but if not aliened, it will descend to the heir.

The words of limitation, however, are essential. Where a testator gave his real and personal estate to his wife, subject among other bequests to an annuity of 50*l.* to A. B. *for ever*, it was held that on the death of A. B., intestate, the annuity passed to his personal representatives: *Taylor* v. *Martindale*, 12 Sim. 158; *S. C.*, 1 Y. & C. Ch. C. 658. See also *Parsons* v. *Parsons*, L. R., 8 Eq. 260.

Whether estate pur autre vie passes without words of limitation.

Leaseholds for years were held, even before the Wills Act, to pass absolutely and entirely under a simple gift of messuages, or other such descriptive appellation (*d*): and the same rule of construction seems to have applied to leases for lives; since the doctrine of general occupancy, which regulated the destination of such property in the absence of a special occupant, necessarily supposed that words of limitation (which, when applied to estates *pur autre vie*, are merely the nomination of a special occupant) are not requisite to pass the whole estate; and accordingly we find that where lands were devised to A. for the life of B., and A. died, living B., the executor or administrator of A. was held to be entitled: *Phillips* v. *Phillips*, 1 P. W. 34. In *Doe* v. *Robinson*, 2 Mann. & Ryl. 249; *S. C.*, 8 Barn. & Cr. 296, however, a case before the Wills Act, a notion

Doe v. *Robinson.*

(*d*) But see now the 26th section of the Wills Act, 1 Vict. c. 26, and the cases decided on the section: *Wilson* v. *Eden*, 11 Bea. 237; 5 Ex. 752; 14 Bea. 317; 18 Q. B. 474; 16 Bea. 153; *S. C.*, *Prescot* v. *Barker*, L. R., 8 Ch. 174. But leases for lives, being freehold interests, are within sect. 28 of the Wills Act, and a gift of them will not now require any words of limitation to pass the fee. See Jarman on Wills, vol. i. 671.

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seems to have prevailed that words of limitation were necessary in order to vest the entire estate *pur autre vie* in the devisee. The facts were briefly as follows:—The Bishop of D. demised certain lands to A., his heirs and assigns, during the natural lives of B., C., and D., and the life of the survivor. A., by will, devised two closes, part of the demised lands, to his daughter, E. R., without words of limitation, and the residue of his estate to his son. It was held that E. R. (who died during the continuance of the lease) took an estate for her own life only, and that the ulterior interest passed by the residuary clause.

Remarks on *Doe* v. *Robinson.*

If this decision is to be considered as establishing that words of limitation, or some equivalent expressions, were necessary to pass an estate *pur autre vie* in a will, the same rule must obtain in regard to deeds; for it would be doing violence to every sound principle of construction to apply a stricter rule to the former than to the latter, and it must apply no less to deeds creating than to deeds transferring such estates; and the consequence would be, that, if lands were demised, or a rent granted to A. (without words of limitation) during the lives of C. and D., the estate of A. would cease at his death, though the *cestui que vie* were living, which would have the effect of reducing to a dead letter the enactments 29 Car. 2, c. 3, s. 9, and the 14 Geo. 2, c. 20 (*e*), disposing of property of this description belonging to a deceased owner, *of which there is no special occupant.*

Personal annuities of inheritance not common.

Personal annuities of inheritance are not common in modern times. For if A. grant that he and his heirs will pay a yearly sum to B. and his heirs, which forms an annuity in fee; or covenant or give a bond that he and his heirs will pay such an annuity; the heirs of the grantor will not be liable to this demand, unless they inherit from their ancestor, who created it, real assets, that is, descendible lands or hereditaments sufficient for that purpose: Co. Litt. 144 b. But the executors or administrators will be bound, so

(*e*) Repealed, Statute Law Revision, 1867. See now 1 Vict. c. 26, s. 6.

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far as they have assets, whether they are named or not: Dyer, 14, pl. 69; Co. Litt. 209 a; Wms. n. 2, Saund. 137 a; Noy's Max. 200, 233, 241, 9th ed. And equity would compel the personal representatives of the grantor, so far as they have assets, to set aside such a sum as would be sufficient to answer the personal annuity for ever; but the annuitant would have the absolute disposition of the fund so set aside: *Smith* v. *Pybus*, 9 Ves. at p. 574.

Remedies. Action for recovery of arrears of rent.

Remedies for enforcing Payment of Annuities—1. *By Action.*]—In the first place, the grantee of an annuity may bring an action to recover the arrears due. Actions by writ of annuity long ago fell out of use. Formerly an action of debt would not lie for arrears of an annuity in fee, in tail or for life during the continuance of the estate of freehold: *Webb* v. *Jiggs*, 4 M. & Sel. 113. But on the determination of the freehold action for debt would lie; so on the death of a grantee for life of an annuity, his executors would bring an action of debt for the arrears due to him: *Ognel's case*, 4 Rep. 48 b. A rent-charge or annuity in fee could only have been recovered by a real action. But since the abolition of real actions by the stat. 3 & 4 Will. 4, c. 27, s. 36, it has been held that actions of debt would lie for the recovery of rent-charges in fee: *Thomas* v. *Sylvester*, L. R., 8 Q. B. 368. When an annuity was granted by deed, an action on the covenant, and in other cases upon the contract, would also lie; and before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it was a matter of considerable importance to determine which was the proper form of action to bring under the particular circumstances of the case. By that Act, however, it was rendered unnecessary to mention in the writ what was the form of action, and by Order I., r. 1, of the Rules of Court, 1875 (now Order I., r. 1, of the Rules of Court, 1883), forms of actions were in effect altogether abolished.

Where land is charged with an annuity, with power of distress and entry in the event of the annuity being in arrear, the grantee must wait until the first rent day which occurs after the first day fixed for

payment of the annuity before he is entitled to demand payment, and he cannot require that rent should be kept back to answer the first instalment: *Hasluck* v. *Pedley*, L. R., 19 Eq. 271.

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2. *By Distress.*]—It was not sufficient at the common law, to support a distress for rent, that such rent was properly reserved or granted, but it was also necessary that the party distraining should have a seisin of the rent, without which there was no privity between him and the tenant; and therefore, before the stat. 4 Anne, c. 16 (*f*), had rendered attornment in future unnecessary, it was requisite, upon the grant of a rent-charge or rent service by a common law conveyance, that the tenant should attorn to the grantee, in order to give him a seisin in law of the rent, without which the grantee could not distrain: Co. Litt. 309, 311. But the doctrine of seisin, with relation to a distress for rent, has become nearly obsolete since the stat. 4 Anne, c. 16 (*f*), s. 9, whereby grants and conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, are rendered good and effectual to all intents and purposes, without any attornment of tenants, but so that no tenant shall be prejudiced by payment of rent or breach of condition before notice of such grants. There are, however, some cases in which the seisin of a rent may still come in question: as, in a distress for an ancient rent-charge, created before that Act by a conveyance taking effect by the principles of the common law, and not by the Statute of Uses. For the stat. 32 Hen. 8, c. 2, s. 4, enacts—

Power of Distress.

Seisin of a rent.

Attornment.

"That no person or persons shall hereafter make any avowry or cognizance for any rent, suit, or service, and allege any *seisin* of any rent, suit, or service, in the same avowry or cognizance in the possession of his or their ancestors or predecessor or predecessors, or in his own possession, or in the possession of any other whose estate he shall pretend or claim to have, above *fifty* years next before the making of the said avowry or cognizance."

(*f*) In the Rev. Stat., it is chapter 3.

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Now, a rent-charge, if created before the first day of Trinity Term, 1706, is not within the stat. 4 Anne, c. 16; *Long* v. *Buckeridge*, 1 Stra. 106; nor is any *rent-charge* within the statute 11 Geo. 2, c. 19, entitling the distrainor to avow generally for rents, without alleging a seisin thereof: *Lindon* v. *Collins*, Willes, 429; *Bulpit* v. *Clarke*, 1 Bos. & P. New Rep. 56. And, therefore, such ancient rent-charge still continues under the operation of the Act, 32 Hen. 8, c. 2. But, as it has been determined, that this statute does not require an actual seisin by receipt of the rent, but only a seisin in law; *Bevil's case*, 4 Rep. at 10 b; and see *Fawkner* v. *Bellingham*, Hetley, 36; *Foster's case*, 8 Rep. at 64; it would, perhaps, be satisfied by showing any act or assent on the part of the tenant, which would have amounted to an implied attornment at the common law: *Anonymous*, 3 Leon. 17; *Bevil's case*, 4 Rep. at 12; Bradby on Distresses, 32. However, even before the 4 Anne, c. 16, if a rent were originally granted by way of use, under the Statute of Uses, 27 Hen. 8, c. 10, attornment was unnecessary. See sects. 4 and 5 of that Act; and see *Cromwell's case*, 2 Rep. 726; Gilb. Uses, 200.

Distress the best remedy.

Distress is a more plain and certain remedy than an action for recovery of arrears; for the action must be brought against the persons who took the profits when the rent became behind, or against their executors or administrators; but the distress may be taken upon the land, be it either in the tenant's own hands, or in the hands of any other who claims by or from him (that is, by interpretation, under him), by purchase, gift, or descent. And these words, *claiming only by and from him*, are to be understood claiming only from or under him by purchase, gift, or descent, and not paramount or above him; as the lord by escheat claims not under the tenant by purchase, gift, or descent, but by reason of his seigniory, which is a title paramount: Co. Litt. 162, b. For other cases not within the statute on a like ground, see Cro. Eliz. 332; 1 Leon. 302; 2 Vern. 612. See also, on the extent of this branch of the statute, *Edrich's case*, 5 Rep. 118.

A power of

Therefore, wherever a rent-charge can be dis-

trained for, the remedy follows the land in the hands of any succeeding tenants claiming under or through the person who granted the rent-charge; or if the tenant be dead, the goods of the deceased may be distrained in the hands of his executor or administrator for the rent accrued before and after his death: Bradby, 112; *Braithwaite* v. *Cooksey*, 1 H. Bl. 465.

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distress follows the land.

If a man grant a rent-charge to A., for the life of B., and let the lands to C. for life, the remainder to D. in fee; the rent is behind for many years; B. dies, and afterwards C. dies; A. may distrain D. in remainder for all the arrears, by the latter branch of the stat. 32 Hen. 8, c. 37. And this diversity arises from the difference between the former branch and this latter; which was so expounded and adjudged in *Edrich's case*, 5 Rep. 118; the latter clause giving the lesser estate the greater remedy.

Remainderman claiming under grantor of a rent-charge, subsequent to the grant, liable to a distress.

So, if a tenant for life grant a rent-charge, and afterwards surrender his estate to the lessor; although the estate charged be merged, and the lessor is not in by him, yet he shall hold it charged: Co. Litt. 185, a., 338, b.; Preston on Merger, 447, 456, 471.

Surrenderor liable for rent-charge granted by surrenderee.

So, if a rent be granted out of two parts of certain land, and afterwards a lease be made of the two parts to A.; and the other part also comes to A., by another lease from him who has the third part, the cattle of the lessee may be taken for this rent: 1 Roll. Abr. 670, pl. 34; *Newman* v. *Moore*, Hob. 80, 4th ed. So, where a stranger claims under the grantor, after the grant of a rent-charge, his cattle are liable to a distress: as the cattle of a lessee, where the demise was after the grant: Com. Dig. *Distress* (B.) 2.

Lessee of lands under several lessors, liable to rent-charge granted by one of them.

So, if a rent-charge issue out of land, which is in the hands of several men, a distress may be taken for the whole rent upon the possession of one; for all the rent issues out of every part: Roll. Abr. 671, pl. 12. So, if a rent-service or a rent-charge issue out of land lying in several counties, a distress for the whole may be taken in one county: 1 Roll. Abr. 671, pl. 10 and 11. See *Wright* v. *Rumball*, 1 Ld. Raym. 55.

Several tenants of lands subject to a rent-charge.

Lands in several counties.

In Com. Dig. *Distress* (B.) 2, it is said that for a

Distress on

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rent-charge generally the cattle or goods of a stranger cannot be distrained. However, it is quite clear that the goods of a stranger, who is not entitled paramount the grantor, are liable to a distress for a rent-charge; Vin. Abr. *Distress* (I.) pl. 27; Selw. N. P. 580; *Kemp* v. *Cruwes*, 2 Wms. Saund. 290, n. (7); *Saffery* v. *Elgood*, 3 Nev. & M. 346; *S. C.*, 1 A. & E. 191; and that whether the actual tenant of the land on which the stranger puts his goods claims under the grantor or not: *Saffery* v. *Elgood*.

goods of stranger.

To exempt the goods even of a stranger from a distress for rent, it is necessary that they should be on the premises demised under peculiar circumstances: as for the purpose of trade, in which case, on account of the public advantage of trade, they are privileged from distress: or the place in which they are found should be itself privileged for the like reason of general benefit; as a market, fair, or public inn: Bradby, 115, 208; 3 Bla. Com. 8; Gilb. Distresses, 39, 3rd ed.; *Gorton* v. *Falkner*, 4 Term Rep. 565.

Exemption of goods of strangers.

The following are instances of persons in whose hands goods of strangers has been held to be exempt from distress, as being "things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ:" *Simpson* v. *Hartopp*, Willes, 512; factors, *Gilmore* v. *Elton*, 3 B. & B. 75; wharfingers, *Thompson* v. *Mashite*, 1 Bing. 283; *Mathias* v. *Mesnard*, 2 C. & P. 353; auctioneers, *Adams* v. *Grove*, 1 C. & M. 390; *Brown* v. *Arundel*, 10 C. B. 54 (but the exemption only extends to goods actually on the auctioneer's premises, *Lyons* v. *Elliott*, 1 Q. B. D. 210); commission agents, *Findon* v. *M'Laren*, 6 Q. B. 891; pawnbrokers, *Swire* v. *Leech*, 18 C. B., N. S. 479; 45 L. J., Q. B. 159; furniture warehousemen, *Miles* v. *Furber*, L. R., 8 Q. B. 77.

Goods in the possession of the law.

It is a rule, that neither the goods of the tenant or a stranger can be distrained for rent, if they are already in the custody of the law; as if taken damage feasant, or under an execution, unless such execution be already satisfied; *Harwell* v. *Burwell*, Sir W. Jones, 456; because, in these cases, an interest in the goods

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is vested in third persons by the act of law, which cannot be divested, unless by their own default: Bradby, 115. But if goods remain on the demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained as before: *Smith* v. *Russell*, 3 Taunt. 400. And under 8 Anne, c. 14, the landlord is entitled to rent to the extent of one year, although there be an execution, excepting as against the crown. *Vide infra*, tit. LEASES.

Other exemptions.

Besides the above-mentioned exemptions, the following things are not distrainable at common law, viz., things annexed to the freehold, cocks or sheaves of corn, beasts of the plough and instruments of husbandry, and the instruments of a man's trade or profession: "the two last are only exempt, *sub modo*, that is, upon a supposition that there is sufficient distress besides:" per *Willes*, C. J., in *Simpson* v. *Hartopp*, Willes, 512; and see the notes on that case, 1 Smith's L. C. 450. By the stat. 2 Wm. & M. sess. 1, c. 5, s. 2, sheaves or cocks of corn, and hay and straw loose or in the stack, are made distrainable, and it has been held that, under that Act, and stat. 4 Geo. 2, c. 28, s. 5 the grantee of a rent-charge may distrain this class of property: *Johnson* v. *Faulkner*, 2 Q. B. 923. Animals *feræ naturæ* are also exempt from distress by common law; Co. Litt. 47, a.; 1 Roll. Abr. 666; but the privilege does not extend to deer in a park: *Davies* v. *Powell*, Willes, 46. See also *Morgan* v. *Earl of Abergavenny*, 8 C. B. 768.

Distress by the lord of an ancient seigniory for services.

As to a landlord's right of distraining a stranger's cattle which escape, *vide infra*, tit. LEASES. It seems, the lord of the fee for an ancient rent may distrain cattle which come in by escape, although they have not been *levant* and *couchant*: 1 Ld. Raym. 167, Argu.; 9 Vin. Abr. 144, n.; 1 Roll. Abr. 668, pl. 2 and 3. However, it seems to be admitted, that the lord may distrain them after they have been *levant* and *couchant*, without giving notice to the owner of the cattle; Doctor and Student, Dial. I. ch. 7, p. 24, 18th ed.; Wms. n. 2 Saund. 290, (7); Hargr. n. Co. Litt. 47, b. (3); Bradby, 115; although

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it be in default of the fences, which the tenant of the land ought to maintain, because the lord of the seigniory has nothing to do with the repairing of the fences; but the owner may prevent the distress, by pursuing and retaking the cattle before the distress be made: 1 Ld. Raym. 168, Argu.; Gilb. Distresses, 46, 3rd ed. It is said that the grantee of a rent-charge may distrain the cattle of a stranger, after they have been *levant* and *couchant*, 2 Leon. 7, 8, *i.e.*, the stranger's cattle must be so long resident on the lands out of which the rent-charge issues, that notice may be presumed to the owner of them; that is, they must be *lying down* and *rising up* on the premises, *for a night and a day*, without pursuit being made by the owner of them, Gilb. Distresses, 47, Hunt's ed.; and, it is said, although no notice be given to the owner; because the grantee, having nothing to do with the fences, there is no default in him as there is in a landlord, and that therefore such notice is not necessary: *Kimp* v. *Cruwes*, 2 Lutw. at 1580; Wms. n. 2 Saund. 290, (7); Hargr. n. Co. Litt. 47, b., (3). But it is rather singular, that the grantee of a rent-charge should be in a better situation as to taking a distress than the person who granted him the power of distress.

By a grantee of a rent-charge.

Definition of levancy and couchancy.

In a case where a rent-charge had been in arrear for twenty years, and cattle, escaping out of the adjoining grounds, had been distrained for the arrears, the distress was relieved against in equity: *Brodon* v. *Pierce*, cited 2 Vern. 131. See further, upon the question as to what may and what may not be distrained, *infra*, tit. Leases; also Smith's Landlord and Tenant, p. 212: Woodfall, Landlord and Tenant (by Lely), p. 383.

Grant of rent-charge by one joint tenant.

Persons having a joint interest in lands with others are not liable to a distress for a rent-charge granted by the others: thus, if two joint tenants be seised of an estate in fee simple, and one of them grant a rent-charge by deed to another person out of that which belongs to him, in this case, during the life of the grantor, the rent-charge is effectual; but after his decease the grant of the rent-charge is void as a charge on the land; for he who has the land by

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survivorship shall hold the whole land discharged; because he who survives claims and has the land by survivorship under the feoffor, &c., which is by a title paramount the grant of the rent-charge, and has not, nor can claim anything by descent from his companion: Co. Litt. 184 b.; 3 Bac. Abr. 697, *Joint tenants, &c.* (I), 5. However, if he who made the charge be the survivor, it is good for ever: Co. Litt. 184 b. It is on the principle of the above case, that if there be two joint tenants in fee, or for lives, and one of them make a lease for years, reserving a rent, and die, the surviving joint tenant shall have the reversion by survivorship; but he shall not have the rent, because he claims to be in the estate from the first feoffor, which is paramount the rent: Dyer, 187 a (5); Finch's Law, 13, Pickering's ed.; Co. Litt. 185 a.; 1 Rep. 96 a.; 3 Bac. Abr. Gwill. ed. 696, *Joint tenants, &c.* (1), 3, 3; Noy's Max. 4, 19, 9th ed. But if there are several joint tenants, and one grant a rent-charge out of the land, the grantee may distrain the cattle of the grantor, but he cannot distrain the cattle of the other joint tenants; although he may distrain the cattle of a stranger that come upon the land: 1 Roll. Abr. 669, pl. 25, 26, 27; 9 Vin. Abr. 145; *Saffery* v. *Elgood*, 3 Nev. & M. 346; *S. C.*, 1 A. & E. 191. To avoid questions, whenever a joint tenant charges his estate with a rent-charge, he should sever the joint tenancy.

The joint tenancy should be severed.

Coparceners.

But if there be two coparceners of tenements in fee-simple by the common law, Co. Litt. 184 b., or of copyholds, according to the custom, Co. Litt. 185 a., and before any partition made one of them charge by deed that which to her belongs, with a rent-charge, &c., and afterwards dies without issue, by which that which belongs to her descends to the other coparcener, in this case the other parcener shall hold the land charged, &c., because she came to this moiety by descent as heir: Co. Litt. 184 b.

On a unity of seisin in a rent and in the land out of which it issues, coparcener cannot distrain until partition.

Where there is in one of the coparceners a unity of seisin or possession of the rent and the land on which it is charged, there, for the benefit of the coparcener entitled to the rent, the law apportions the rent, by extinguishing only so much of it as is proportionate to her share in the land: but still the

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right of distress is in some degree restrained. So that, if a woman be seised of a rent-charge, and afterwards the lands charged descend to her and her two sisters in coparcenary, only a third part of the rent is extinct by such unity of estate: but yet the coparcener who has the rent cannot distrain on the land for the other two parts of the rent until partition be made; because, until that time, she is seised with her two sisters, *per my et per tout* in the land: Bro. Abr. *Distresse*, pl. 37, 64; Co. Litt. 163 b., 169 a., 175 b.; Bradby, 57. So, if a man seised of four acres of land have issue, a son and a daughter by one marriage, and two daughters by another marriage, and grant a rent-charge out of his land to his son in fee, and the son die without issue in the life of his father, and on the death of the father the land descend to the three daughters, the eldest daughter cannot distrain for the two parts of the rent, until partition be made: Bro. Abr. *Extinguishment and Suspension*, pl. 31.

Tenant of the land claiming by a title paramount is not liable to a distress.

But where the tenant of the land holds by a title paramount the distress, he is not liable to it: *Saffery* v. *Elgood*, 3 Nev. & M. 348; *S. C.*, 1 A. & E. 191; so that, if a man be seised of a rent-charge by *prescription*, issuing out of a manor, it seems he cannot distrain the cattle of the copyholders of the manor, if they have not been accustomed to be distrained: because they are in by prescription also, and therefore their title is as high as that of the owner of the rent: *Cannor* v. *Turner*, 1 Roll. Abr. 669, pl. 32; 9 Vin. Abr. 146. But a *dubitatur* is added. However, it is said in the same case, it is clear, if the owner of the rent has it by *grant*, or otherwise, and not by prescription, the cattle of the copyholders cannot be distrained for it: 1 Roll. 669, pl. 33. So, if a man seised in fee make a lease for life, and afterwards grant a rent-charge, if the grantor's cattle come upon the ground, the grantee may distrain them, although he cannot distrain the tenant in possession, because he holds by a title older than the grantee: Brownl. 32; 9 Vin. Abr. 148, pl. 49. So, if a man lease at will, and afterwards grant a rent-charge (admitting this does not determine the will,

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which it seems it does not, as such demises are now generally considered as tenancies from year and year) the grantee cannot distrain the cattle of the tenant at will, because he was in before the charge, and therefore the tenant of the freehold cannot charge him with distress before the will be determined: 1 Roll. Abr. 669, pl. 31. But these two last-mentioned cases seem to have been derived from the principle of there being no privity between the tenant and grantee without attornment: and it seems, that since the stat. 4 Anne, c. 16 (*g*), the tenant would be liable to be distrained for non-payment of so much of the rent of the lands as is unpaid when he receives notice of the grant of the rent-charge, and for so much rent as becomes due afterwards. *Vide ante*, p. 657.

Wife surviving, not subject to a distress for rent-charge granted by her husband out of her term for years.

And if a man be possessed of lands for a term of years in the right of his wife, and grant a rent-charge, and die, the wife shall avoid the charge, because she does not claim under her husband; but if the husband survive the wife, the charge is good during the term: Co. Litt. 184, b. But the husband's alienation of the term itself, or of any part of it, binds the wife surviving: Hargr. n., Co. Litt. 184, b., (6); Co. Litt. 351, a. See the reason of this difference, Co. Litt. 185, a; and see further, 1 Bac. Abr. 476, Gwill. ed., *Baron and Feme* (C.) 2; Butl. n., Co. Litt. 351, a. (1); 1 Rop. Husband and Wife, 173. Therefore, when a husband charges an annuity on his wife's term for years, he should also absolutely assign the term, upon trusts for securing the annuity.

After assignment or regrant, grantee cannot distrain;

However, in all cases, the privity of estate must remain; and therefore, if one seised in fee of a rent grant it to another in fee, or regrant the rent back to the grantor, either in fee, in tail, or for life, he cannot afterwards distrain for the arrears; because he has by his own act destroyed all the former privity of estate between himself and the tenant; and in respect to it, he has no more right than any stranger to come upon the land, after such transferring over, or re-granting the rents. *Et sic de similibus: Ognel's case*, 4 Rep. 48 b.; *Dixon* v. *Harrison*, Vaugh., at

(*g*) In Rev. Stat., it is chapter 3.

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pp. 40, 43. And it was agreed, *per totam curiam*, if A. have a rent-service, or rent-charge in fee, or for life, and the rent be in arrear, and afterwards A. grant over the rent to another, and the tenant attorn,

nor his executors.

which before the stats. 4 Anne, c. 16 (*h*), s. 9, and 11 Geo. 2, c. 19, s. 11, was in these cases necessary, and afterwards A. die, his executors are not within the 32 Hen. 8, c. 37; for, by the grant over, the arrears were lost, and were not due to the testator at the time of his death, as the statute speaks; the words being, "in as large and ample manner as the said testator might, and ought to have;" and after the grant, the testator himself, nor any other, could *distrain*, or have any remedy for the arrears: also, in the clause next preceding touching the *action of debt*, the words are, "unto whom any such rent or fee-farm is or shall be due, and not paid at the time of his death:" so that the Act gives no remedy when the testator himself, by his own act, has dispensed with the arrears; but only when they were due to him at the time of his death, and by the act of God become remediless: *Ognel's case*, 4 Co. 50 b.;

Assignment of arrears.

Vaugh. 40, 41. Arrears of a rent-charge, due at the time of an assignment, are a mere chose in action: Bradby on Distresses, 52; Vaugh. 40. Notice of such assignment must therefore be given to the debtor: Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25.

The grantee may distrain, though the distress be limited to a stranger for his benefit.

If the distress be limited to a stranger for the benefit of the grantee of the rent, yet the grantee himself may distrain for it; for the stranger is his servant in this, and what he may do by his servant, he may do himself; 2 Roll. Abr. 425 (G.), pl. 3; 18 Vin. Abr. 479; and Mr. Powell, copying Gilb. on Rents, 42, says, in relation to this case, what a man may do by one servant he may do by any other: 1 Pow. on Contracts, 372. But it seems only to extend to the special case of the king, on account of his prerogative: Co. Litt. 147, a.; 7 Rep. 23, a.; Com. Dig. *Rent* (C.) 8; which, in these cases, is more extensive than the powers of a subject: Noy's Max. 42, 134, 9th ed.; *Mountjoy's case*, 5 Rep. 4. However, these prerogative powers are not extended to

(*h*) Chap. 3, Revised Statutes.

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the grantee of the king: Bro. Abr. *Distresse*, pl. 48; excepting in the case of vendees of fee-farm rents of the crown, under 22 Car. 2, c. 6, who may distrain upon all the lands of the original grantor: Bradby, 93.

Annuitant may distrain for arrears, though a term be vested in himself.

In replevin, the defendant made cognizance as bailiff of Nathaniel Pigott, Esquire, upon a distress for 750*l.* arrears of an annuity or yearly rent; stating, that on the 5th and 6th of January, 1776, the plaintiff, for valuable consideration, did by lease and release, convey to Sir Michael le Fleming and James Rodney, and their heirs, among other things, the lands in which the distress was taken, to the use of the said Pigott for *ninety-nine years*, if he so long lived, on the trusts thereinafter mentioned, and subject thereto, to the use of the said Ann Fairfax, the plaintiff, for her life, with divers remainders over. The *trust* of the term is declared to be, that the said Pigott might yearly, *during his life*, receive and take thereout an annuity or rent of 250*l.* by equal half-yearly payments, at Michaelmas and Lady-day, *with power to enter and distrain for arrears;* and then justifies for a distress for 750*l.* for three years' arrears due Lady-day, 1779. To this cognizance the plaintiff demurs, and the defendant joins in demurrer. For the plaintiff, it was objected, that the ninety-nine years' term being vested in Pigott, he could not distrain upon lands in his own legal possession, though he might bring an ejectment. But, by *Blackstone*, J. (*absente De Grey*, C. J., and *Gould*, J.): "I look upon Mrs. Fairfax, during the ninety-nine years' term, to be, by her own act and consent, a mere *under tenant* to Pigott, at the rent of 250*l.* per annum, for which he has paid a valuable consideration. *To this rent a distress is incident by law, exclusive of the clause in the deed.* So that there is no colour for the objection. *Nares*, J., of the same opinion, for this and many other reasons." Judgment for the cognizor: *Fairfax* v. *Gray*, 2 W. Bl. 1326.

4 Geo. 2, c. 28, s. 4; Serjt. Hill's MS. notes to W. Blac. Rep.

The late Mr. Serjeant Hill, referring to the above case, says, "Though the opinion is given there exclusive of the clause in the deed, yet, as there was

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a clause for distress in the deed, the opinion was extra-judicial: Serjeant Hill's MS. notes to 2 Vin. Abr. 516; 9 Vin. Abr. 125; 15 Vin. Abr. 362, in Lincoln's Inn Library.

Rents seck may be recovered by distress.

The remedy by distress is, by the common law, incident to a rent-service; but to have constituted a rent-charge a power of distress must have been expressly given by the deed: Bac. Abr. *Rent* (K.). By the common law, no distress was incident to a rent seck; but that remedy was given by the stat. 4 Geo. 2, c. 28, s. 5, stated *infra*, tit. LEASES.

A rent granted since stat. *quia emptores*, and before stat. 4 Geo. 2, c. 28.

For a rent, without an express clause of distress, granted in fee since the Statute of *Quia Emptores*, and before the passing of this statute, there cannot be a distress but under this statute; and therefore, in an avowry for such a distress, the case must be brought within it: *Bradbury* v. *Wright*, Doug. at p. 627. Mr. Justice *Blackstone* says: "The statute 4 Geo. 2, c. 28, extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them. So that now we may lay it down as an universal principle, that a distress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it:" 3 Bla. Com. 6, 7. This must, however, be understood with some limitation; for, at the common law, it was not every reservation, though *nominally of rent*, which constituted a *rent*, properly so called; thus, at common law, a *rent* could not issue out of a mere chattel.

What is distrainable within 4 Geo. 2, c. 28, s. 4.

A rent cannot issue out of a chattel, but a term may be subjected to a distress by an express power.

But a power of distress may be given to recover a quasi rent reserved or granted for years or for life out of a term of years, which power operates in all respects like a power granted by the owner of the fee, and not merely by estoppel against the grantor. Thus, in *Butt's case*, 7 Rep. 23, in replevin, one seised of Blackacre in fee, and also possessed of Whiteacre for years, by his deed granted a rent out of both to A., to have and perceive to him for the term of his life, *with clause of distress in both;* and for rent behind, A. distrained, and avowed in Whiteacre. And it was agreed by the whole Court

that the distress was well taken. See also *Saffery* v. *Elgood*, 3 Nev. & M. 346; 1 Ad. & El. 191, *S. P.*

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In the grant of a rent-charge, it appears that the rent may issue out of one parcel of land, and the distress be reserved in another; and in this case, whether the lands lie within the same or different counties, it seems that the distress can be taken only on the land in which it is reserved: Co. Litt. 147 b. But both parcels of land are charged, one with the rent, and the other with a distress for the rent; one issuing out of the land, and the other to be taken upon the land: Co. Litt. 147, a. In *Butt's case*, 7 Rep. 24 a, it is said, that as the parties have expressly limited out of what land the rent shall issue, and in what land the distress shall be taken, the law will not make an exposition against the express words and intent of the parties; when it may stand with the rule of law, *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est:* Co. Litt. 147 a; Wingate's Maxims, 24; 2 Saund. 167; 14 Vin. Abr. 58, pl. 6; 2 Roll. Abr. 425 (E.), pl. 2; 18 Vin. Abr. 478, pl. 2. But it would seem that the stat. 4 Geo. 2, c. 28, s. 5, has altered the law in this respect, and enabled the grantee in such a case to distrain in both parcels of land, unless the parcel out of which the rent is issuing, be expressly exempted from the distress.

Grant of rent in one parcel of land and distress in another.

When a testator had a power to distrain for a rent at common law, and devised the rent, the devisee could distrain without attornment; but if the devisor had not that power, he could not confer it on his devisee, according to the rule in *Finch's case*, 5 Rep. 113; Co. Litt. 309 b. *Nemo potest plus juris ad alium transferre quam in ipso est; Nil dat quod in se non habet:* *Long* v. *Buckeridge*, 1 Str. at pp. 109, 111. Where a rent for an estate of freehold was devised out of a freehold without any estate in the land, it seems formerly to have been necessary for the devisor to give a power of distress; that is in effect to make it a rent-charge, in order to entitle the devisee to distrain: *Gough* v. *Hayward*, Bridgm. 53; and although this is not now necessary, as a *freehold* rent devised out of *freehold* must be considered as a rent seck, to

Devise of a rent.

Power of distress not necessary on creating a freehold rent by devise.

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which the stat. 4 Geo. 2, c. 28, s. 5, has extended the right of distress: Bradby, 89; *Buttery* v. *Robinson*, 3 Bing. 392. See also *Saward* v. *Anstey*, 10 J. B. Moore, at p. 60; yet it is usual to give such an express power by the will since the statute.

Difference between a devise and a bequest of a rent.

There is, however, one considerable difference between the devise of a freehold estate, or a freehold rent, and the bequest of a chattel interest: for a devise vests absolutely by the testator's will, but the interest of the legatee must await the executor's assent to the bequest; and therefore, before such assent, the interest remains in the executor, and consequently the legatee cannot distrain, although an express power of distress be given by the will: Toller's Law of Executors, 306, 307. This assent may be either express or implied; but it must relate to the particular subject of the legacy. Thus, if a lessee for years bequeath a rent to A., issuing out of the land, and bequeath the land to B., the executor's assent that A. should have the rent, is no assent that B. should have the land, because the rent and the land are distinct legacies: *Gough* v. *Hayward*, Bridgm. at p. 55. But, under special circumstances, an executor's assent to one legacy may enure to another; as, if the case last mentioned be reversed, the executor's assent that B. should have the land, seems to imply his assent that A. should have the rent: Toller on Executors, 310, where it is said, "As it was the testator's intention that B. should hold the land subject to the rent to A., the executor's assent to B.'s having the land shall, in conformity to the will, be construed an assent to the legacy to A.:" Went. Off. Ex., ed. 1829, 428; Toll. Ex. 310; *Welchden* v. *Elkington*, Plowd. 521; 1 Roll. Abr. 620 (E.), pl. 3; Godolphin's Orphans' Legacy, 360, 4th ed. See also Williams on Executors, 1378.

Power of distress usually given on creating a rent.

Although the stat. 4 Geo. 2, c. 28, s. 5, has given a remedy by distress for recovering a fee-farm rent, as a rent seck, when there is no power of distress, yet as a distress is not incident to this rent by the common law, it was, until recently, usual to give an express power of distress, and thereby make it a

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rent-charge: on creating a fee-farm rent or a rent for life or lives out of freehold lands; or a rent for years out of a freehold, and such a power of distress was invariably given on creating a rent for years, to be issuing out of a freehold estate, or on creating a rent for life, or years, or for years determinable on a life or lives, to be issuing out of a chattel interest. But now the insertion of a power of distress in a grant of an annuity or rent-charge is rendered unnecessary by the Conveyancing and Law of Property Act, 1881, by sect. 44 of which it is enacted:—

Power of distress necessary on creating a rent out of a chattel interest.

Remedies for recovery of annual sums charged on land.

"(1) Where a person is entitled to receive out of any land (*i*), or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land, or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

"(2) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

"(5) This section applies only if and so far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"(6) This section applies only where that instrument comes into operation after the commencement of this Act."

Executor should distrain for ar-

If the testator by his will specifically bequeath his reversionary interest in the term, it is necessary that

(*i*) By sect. 2 of the Act, "land" includes "land of any tenure."

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his executor should distrain for the arrears, before his assent to the legacy; as the reversion will thereby be vested in the legatee; *vide ante*, p. 670; and being thus divested out of the executor by his own assent, it should seem that he can no longer distrain for the arrears incurred in his testator's lifetime, although he may have an action on the contract against the lessee. But where a term of years vests in executors or administrators, they may of course distrain for the rent accruing in their own time, as if they were entitled to it in their own right.

rears of rent before he assents to a bequest of the term.

A distress may be made under a power, although not demanded on the day it becomes due.

A distinction is taken between a power to re-enter, or a *nomine pœnæ*, and a power to distrain; as where a rent is granted payable, &c., and in default of payment, *if it be demanded*, the grantee may distrain. In this case it is held not to be necessary to make a demand on the day the rent becomes due, as in the case of a re-entry, or a *nomine pœnæ*, where the contrary is not stipulated, but he may demand the rent at any time after, to enable him to distrain: Co. Litt. 202, a., 144, a.; *Maund's case*, 7 Rep. 28, b.; *Foster* v. *Wandlass*, 7 T. R. 117; Wms. n., 1 Saund. 287, d.; Gilb. Rents, 73, 79, 83; even although the land should be in possession of a stranger: *Umphery* v. *Damyon*, 1 Buls. 181. See as to this point, *infra*, tit. Leases. In *Doe* d. *Biass* v. *Horsley*, 3 Nev. & M. 567, it was held, that a devisee of a rent-charge, with power of entry and perception, in case the rent should be in arrear for a certain time, might, upon the rent falling in arrear, maintain ejectment, without previously demanding the rent, on the ground that it was no *forfeiture*, but a mere right to enter, and receive the rents until the arrears were satisfied. See *Pierson* v. *Sorrel*, 2 Show. 185; Vin. Abr. *Demand* (B.) 8.

Demand.

A power of distress not usually given on copyhold premises alone.

When an annuity was granted, to be issuing out of a copyhold estate, it was not usual to give a power of distress; because it has been conceived that a copyholder cannot grant such a power. However, Lord *Coke* expressly says, that such a rent-charge extends as well to estates by the custom, as to estates at the common law: Co. Litt. 185, a. And it seems that such a power of distress is good against every

person claiming under the grantor, but not against the lord, who claims by a title paramount. See Gilb. Ten. 297; 2 Watk. Cop. 63, 64. And it would seem that the statutory remedies given by sect. 44 of the Conveyancing Act, 1881, will have the same limited operation in the case of rent-charges issuing out of copyholds. See sub-sect. (1), *ad fin.*

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For more as to the remedy by distress, *vide infra*, tit. LEASES.

3. *By Entry.*]—In addition to the power of distress, it was formerly the practice to give a power of entry on the lands to the grantee of an annuity or rent-charge and his representatives, on default in paying the annuity or rent-charge for a certain number of days.

Power of entry.

But now by sect. 44 of the stat. 44 & 45 Vict. c. 41, it is enacted that, as regards instruments coming into operation after the 31st December, 1881,—

"(3) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste."

Where grantor impeachable for waste.

Where the grantor himself is impeachable for waste, a provision that the possession shall not be without impeachment should be inserted in the instrument creating the annuity.

Although generally a right of entry will pass to the assignee of a rent, there must be clear evidence of the intention to annex such a right to the rent into whatever hands it comes; and therefore where R. devised a rent-charge to his widow during her widowhood, with power *to her* to enter, &c., and after her marriage the rent to be paid to C., his executors, administrators, and assigns; and upon the

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marriage of the widow, C. received the rent during his life, and died without bequeathing it; it was held that his executor could not enter or bring ejectment on non-payment of the rent: *Hassell* v. *Gowthwaite*, Willes, 500.

Power of entry not extended to copyholds.

It has been considered that the power of entry hitherto ordinarily inserted in annuity deeds cannot extend to copyholds; because, first, copyholds are not within the Statute of Uses; Gilb. Ten. 182; Co. Cop. s. 54, Tr. 124; Noy's Max. 319, 9th ed.; secondly, the tenant has no power to convey a copyhold estate except by surrender, according to the custom; for if he had, the lord would have a tenant brought into the estate without his admittance or consent: Gilb. Ten. 181, 185. Inasmuch as the remedies given by the 44th section of the Conveyancing Act apply only "as far as those remedies might have been conferred by the instrument under which the annual sum arises, and no further" (sub-sect. 1, *ante*, p. 671), it would appear that copyholds are not within the statutory powers of entry.

Term of years to secure annuity.

The 44th section of that Act also does away with the necessity for inserting in annuity deeds a limitation to trustees for a term of years to secure the annuity by providing that in case of default in payment as before mentioned (*ante*, p. 671):—

"The person entitled to the annual charges, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years with or without impeachment of waste, on trust by mortgage, sale, or demise, for all or any part of the term of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created." (Sub-sect. 4.)

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It is seldom necessary in practice to have recourse to the remedy afforded by the limitation of a term, and if in any case circumstances should occur rendering the creation of a term advisable, a term can then be created under this section. See Wolstenholme, Conv. Acts, p. 97.

Terms on which a trustee in possession will be ordered to deliver up possession after arrears paid.

Where a trustee of a term of years, upon the usual trusts for securing annuities, has taken possession of the estates under the trusts, although all arrears of the annuities may afterwards be paid, the Court will not order possession to be given up to the grantor, except upon such terms as will enable the trustees to resume it, and to receive the rents the moment the annuities are again in arrear, without the necessity of bringing an ejectment: and therefore in the interim the grantor, or his agents, to receive the rents and profits in the names of the trustee and the annuitant, or one of them, and the receipts to be given accordingly; and the grantor to be at liberty to use the names of the trustee and annuitant, or either of them, in making or supporting distresses for rent upon the tenants of the estates; the grantor indemnifying the trustee and annuitant, and each of them, from all costs and damages by reason or in consequence of such distress: *Jenkins* v. *Milford*, 1 Jac. & Walk. 629.

Equity will direct a sale in order to raise arrears of rent-charge.

Cupit v. *Jackson*.

4. *By Sale.*]—In addition to the remedies at law which the owner of a rent-charge has for its recovery, he has in some cases an equitable right to an order that the arrears be raised by sale or mortgage. Thus, in *Cupit* v. *Jackson*, M'Clel. 495; *S. C.*, 13 Price, 721, where, on the marriage of T. B. with E. J., certain lands were limited to the use and intent (among other limitations), that T. B. should receive during his life an annuity or yearly rent of 60*l.*, and to which were annexed the usual powers of distress and entry. At his death, arrears to the amount of 450*l.* were due, and his executors filed a bill against the owner in fee of the lands, praying payment of the arrears, and that they might be raised by sale or mortgage. *Alexander*, C. B., held, that, though the plaintiff had legal remedies for the recovery of the

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rent-charge, yet this was no bar to the equitable relief sought, which was more convenient and effectual; and he was of opinion that the Court had a right to raise the arrears out of the estate, if necessary, by sale or mortgage, the charge being an incumbrance on the estate. So in *White* v. *James*, 26 Beav. 191, a sale was decreed to raise arrears of a rent-charge granted with powers of distress and entry, there being nothing to distrain on. But the Court will not make an order for sale or mortgage where the land charged with the annuity is in strict settlement, unless the annuity is expressly charged on the *corpus*: *Taylor* v. *Taylor*, L. R., 17 Eq. 324. See also *Pearson* v. *Helliwell*, L. R., 18 Eq. 411. If the annuity is given by will, as in the two last-named cases, the question is whether the gift is to be construed as a gift of an annuity or as a gift of income, or part of the income. Per Lord *Selborne* in *Carmichael* v. *Gee*, 5 App. Cas. 588, 593. See the cases there collected, and *infra*, tit. WILLS.

PROOF IN BANKRUPTCY. Stat. 32 & 33 Vict. c. 71.

Proof in Bankruptcy.]—The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), does not contain any express provisions with regard to proof for annuities (*k*). It

(*k*) The following provisions, material to the present purpose, are contained in the Bankruptcy Act, 1883, with regard to proof of debts generally:—

Proof of debts provable in bankruptcy.

Sect. 37. "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy."

"(3.) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

"(4.) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value."

"(5.) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court."

"(8.) 'Liability' shall, for the purposes of this Act, include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agree-

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may, therefore, be well briefly to indicate the principles and practice with regard to proof for annuities obtaining before the passing of the above Act.

In the case of *Ex parte Artis*, 2 Ves. sen. 489, Lord *Hardwicke* thus states the general rule under the earlier bankruptcy laws:—"Where one is entitled to an annuity from another, which is not a rent-charge on land or on a specific part of his estate, but a personal annuity to be paid by that person who becomes bankrupt, it is only a general demand on him and his estate, and there is nothing than a debt on his estate but the arrears of the annuity at the time of the bankruptcy; for those accruing afterward become a debt after the bankruptcy." By the introduction of a bond for securing payment of the annuity, a mode of putting a value on the annuity was established. On default of payment the penalty became recoverable, and the amount thereof became a debt at law against the estate in respect of which proof was allowed to be made. But unless the forfeiture was incurred before the bankruptcy no proof was allowed for payment growing due after it. See *Ex parte Le Compte*, 1 Atk. 251; *Pathorn* v. *Banks*, Cowp. 540; *Ex parte Burrow*, 1 Bro. C. C. 268; *Cotterel* v. *Hooke*, 1 Doug. 97.

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ment or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement or undertaking, to pay, or capable of resulting in the payment of money or money's worth, whether the payment is as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion."

"Second Schedule.

Periodical payments.

"Rule 19. When any rent or other payment falls due at stated periods, and the receiving order is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order, as if the rent or payment grew due from day to day."

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By the Bankruptcy Act, 1849, sect. 175, it was enacted:—

Stat. 12 & 13 Vict. c. 106.

Annuity creditors admitted to prove.

"That any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the Court shall ascertain, regard being had to the original price given for such annuity, deducting, therefore, such diminution in the value thereof as shall have been occasioned by the lapse of time since the grant thereof to the date of the fiat, or the filing of the petition for adjudication of bankruptcy" (*l*).

It is be to observed that considerations as to the state of health of the annuitant are omitted by the section, and will not be taken into account in estimating the value of the annuity for purposes of proof. See *Ex parte Fisher*, 2 Gl. & J. 102. The improved value of property, if property and not money was given for the annuity, might perhaps be taken into consideration (see Robson on Bankruptcy, 224), but not the depreciation of money, *Ex parte Webb*, Ibid. 29. As to proof for annuities granted in consideration of giving up the goodwill of a business, see *Ex parte Saxe*, 2 D. & C. 172; *Ex parte Annandale*, 4 D. & C. 511; *Ex parte Scholes*, 1 M., D. & De G. 384; 4 Jur. 1189.

Contingent annuities.

It has been decided in several cases that under stat. 6 Geo. 4, c. 16, s. 54, contingent annuities might under certain circumstances be provable in bankruptcy. See *Ex parte Van Leythusen*, 2 M. & A. 519; *Ex parte Parratt*, Ibid. 626. So in *Ex parte Broadley*, 2 M., D. & De G. 524, it was held that under that section the trustees of a marriage settlement might prove against the estate of a bankrupt husband in respect of the value of an annuity, for which he had given his bond to them, in favour of his wife who was still living, in case she should survive him.

Under the repealed Bankruptcy Act, 1869, proofs were admitted in respect of annuities dependent on

(*l*) Where the so-called annuity is merely of the nature of interest on a loan transaction no proof in respect of it was allowed: *Ex parte Robinson* (LL.J.), 31 L. J. (N. S.), Bank. 12.

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contingencies which were formerly held to be incapable of estimation. Thus in *Butt* v. *Jackson*, L. R., 4 C. P. 259, where an annuity was granted determinable on breach by the grantee of stipulations that he would use his best endeavours to extend the business of the grantors, and not by any act, &c. injure the same, and that he would not carry on a similar business within a certain district, it was held that the conditions for defeasance were so uncertain as to render the value of the annuity incapable of estimation, and consequently not provable under stat. 12 & 13 Vict. c. 106, s. 75. But in the more recent case of *Ex parte Jackson*, 20 W. R. 1023, where the annuity deed contained similar stipulations (except as to endeavouring to extend the grantor's business), it was held that the grantee's claim in respect of his annuity was provable under sect. 31 of the Bankruptcy Act, 1869. So also with regard to deeds of separation.

Annuity determinable on future cohabitation.

In *Parker* v. *Ince*, 28 L. J. (N. S.), Ex. 189, it was held that an annuity determinable on future cohabitation was not provable in bankruptcy, inasmuch as the contingencies on which the cesser depended were incapable of estimation. And this decision was followed in the later case of *Mudge* v. *Rowan*, L. R., 3 Ex. 85. In *Ex parte Naden*, L. R., 9 Ch. 670, where a bankrupt had gone through the form of marriage with his deceased wife's sister, and subsequently on separation from her had covenanted to pay to her an annuity determinable if they should live together again, it was held that the condition might be disregarded inasmuch as it was incapable of performance if legal cohabitation was intended, and *contra bonos mores* if otherwise; and that accordingly the value of the annuity was capable of estimation and provable. But in the later case of *Ex parte Blakemore* (C. A.), 5 Ch. D. 372, it was held that an annuity during the life or widowhood of the grantee is capable of estimation, and proof will be admitted for the value of the future payments as ascertained by an actuary; and in a still more recent case, the value of an annuity granted by a separation deed, and determinable in case the wife should not live a

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chaste life, or on resumption of cohabitation, was held to be provable. *Baggallay*, L. J., said: "*Mudge* v. *Rowan* and *Parker* v. *Ince*, were decisions on another statute, the words of which differed materially from those of sect. 31 of the Act of 1869 (*m*). I have no doubt that that section, and particularly the words in the latter clause of it, were introduced for the express purpose of meeting those decisions. Words more large and general it is impossible to conceive. They cover every species of contingency:" *Ex parte Neal* (C. A.), 14 Ch. D. 579. See also *Ex parte Pearce* (C. A.), 13 Ch. D. 262.

When the valuation of an annuity dependent on a contingency has been made, the ascertained amount becomes provable once for all, and is not open to revision in the event of the annuitant's death before the amount is received: *Ex parte Bates* (C. A.), 11 Ch. D. 914.

Value of annuity raisable by sale in case of bankruptcy.

It seems, that where the grantor of a rent-charge had become bankrupt, and the value was provable under the commission, the annuitant might obtain an order for sale as in the case of a mortgage, under 6 Geo. 4, c. 16, s. 54 (*n*). In *Ex parte Slack*, 1 Gl. & Ja. 346, upon petition of an annuitant, having a charge upon real estate, the land was ordered to be sold and the purchase-money was directed to be applied in payment of the costs of the application and sale, and then of the arrears due at the date of the commission, and the value of the annuity, the annuitant being at liberty to prove for any deficiency. See also *Ex parte Webb*, 2 Gl. & J. 29; *Ex parte Fisher*, Ibid. 102; *Ex parte Price*, 3 Madd. 132; *Re Delves*, Mont. 492. If the annuitant has a policy of insurance on the bankrupt's life, he cannot prove without submitting to a sale of the policy, the proceeds of which will be applied, first, in payment of the expenses, and of the premiums paid by the creditor, and then of the annuity: *Ex parte Tierney*,

(*m*) The words of the section referred to were very similar to those of sect. 37 of the Bankruptcy Act, 1883 (*ante*, p. 676), as regards debts and liabilities provable in bankruptcy.

(*n*) This was Mr. Jarman's opinion. See the 3rd ed. of this work, Vol. II. p. 51.

Mont. 78; *Ex parte Varnish*, 1 M., D. & De. G. 514.

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In *Ex parte Price*, 3 Madd. 132, where P. agreed to pay A. an annuity of 40*l.* during his life, in consideration of 400*l.*; and a bond and warrant of attorney were given to secure the same; and two years afterwards P. deposited a lease with A. as a further security; P. having become bankrupt, A. filed a petition, praying that it might be referred to the commissioners to value the annuity, and that the lease might be sold, and the produce applied in satisfaction of the arrears and value (after payment of costs), and that he might prove for the residue: Sir *J. Leach*, V.-C., granted the petition accordingly.

Set-off.

An annuity creditor is entitled to set-off the value of his annuity against a debt due to the bankrupt: *Ex parte Law*, De G. 378.

See further, as to proof in bankruptcy in respect of annuities, Robson on Bankruptcy, p. 223 *et seq.*

EXTINGUISHMENT OF RENTS.

Extinguishment of Rents.]—The Statute of Limitations of Jac. 1 did not apply to a rent-charge, and therefore could not be pleaded as a bar to a claim of arrears either at law or in equity: *Cupit* v. *Jackson*, M'Clel. 505. But after a great lapse of time, without demand, a release or extinguishment of the rent was presumed: *Eldridge* v. *Knott*, Cowp. 214. The law on this subject is now regulated by the statutes, 3 & 4 Will. 4, c. 27, ss. 2 & 42 (as amended by 37 & 38 Vict. c. 57, *ante*, tit. Abstracts), and 3 & 4 Will. 4, c. 42, s. 3. An action for arrears of a rent-charge granted by indenture may be brought within twelve years; *Strachan* v. *Thomas*, 4 Per. & D. 229; 4 Jur. 1183; and time runs from the last receipt. See *Owen* v. *De Beauvoir*, 16 M. & W. 547; *De Beauvoir* v. *Owen*, 5 Ex. 166; *Lord Chichester* v. *Hall*, 17 L. T. 121. Where land charged with a fee-farm rent was sold, and the vendors continued to pay the rent-charge to the person entitled thereto, who was unaware of the sale, it was held that there had been no discontinuance of receipt so as to bar his title: *Adnam* v. *Earl of Sandwich*, 2 Q. B. D. 485. The limitation prescribed by the stat. 3 & 4 Will. 4, c. 27, does not apply to an action on a collateral

Rent-charge now barred by the Statute of Limitations.

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covenant for payment of a rent charged on land, and the covenantee may recover damages for breach of the covenant, notwithstanding his right to recover the rent-charge is barred by the statute: *Manning* v. *Phelps*, 10 Ex. 59. See also *Sims* v. *Strachan*, 12 Ad. & E. 536.

Effect of release on unaccrued rent.

As to the effect of releases upon *rents*, the early books present many distinctions. Thus, it is laid down that a release of all *demands* will extend to a rent-charge, or to a rent-service, parcel of a seigniory in gross: *Wilton* v. *Bye*, Cro. Jac. 486. See 2 Roll. Ab. 408. While, on the other hand, it is clear that it will not extend to a rent incident to a reversion of lands, *i. e.*, to a rent reserved upon an ordinary lease for years. Thus, where an action was brought on a lease for years, for a year's rent due at Lady-day, 1689, and the defendant pleaded a release of all demands, dated 18th Nov. 1688, it was held, that the release extended to discharge the first half-year's rent then overdue, but not that of the second or current half-year, which was then demandable: *Stephens* v. *Snow*, 2 Salk. 578. See also *Henn* v. *Hanson*, 1 Lev. 99; *Ingram* v. *Bray*, 2 Lev. 210.

Release of *actions*, how construed.

It is clear that a release of all *actions* merely would not extend to a rent-charge or annuity: *Tuke* v. *Cheek*, Cr. El. 897; *Diggs's case*, Moore, 133; or at least would apply only to the arrears then actually accrued; 2 Roll. Ab. 404; as the word *actions* in these cases is construed as synonymous with *existing causes of action:* Shepp. Touch. 339. And, therefore, a release of all actions will not discharge a sum of money not due at the time, Co. Litt. 292; unless, indeed (according to a distinction more technical than solid, but much insisted on in the early cases), in the instance of a bond, which, being *debitum in præsenti*, though *solvendum in futuro*, it is said, is discharged by a release given before the day of payment appointed by the condition: Co. Litt. 291; *Altham's case*, 8 Rep. 153; *Cage* v. *Acton*, 1 Ld. Raym. at p. 519. Clearly, however, it would not extend to a covenant not then broken, there being no cause of action until a breach. See *Hoe's case*, 5 Rep. 70. Though it is not certain that all these distinctions would now be adopted, yet persons drawing releases

ought not to lose sight of them, but expressly qualify or enlarge the terms of the instrument so as to exclude doubt.

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Under the old law if the owner of a rent-charge issuing out of twenty acres released all his right to one acre, the rent was extinguished in the whole: 2 Roll. Ab. 414; Co. Litt. 148; Shepp. Touch. 345. And on the same principle, if the grantee of a rent-charge acquired as purchaser part of the land out of which it issues, the rent was gone *in toto*, "because the rent is entire and against common right, and therefore by purchase of part it is extinct in the whole, and cannot be apportioned;" Co. Litt. 148 a.; but if the grantee of a rent-charge released part of the *rent*, such release operated *pro tanto* only, and did not extinguish the whole rent: 5 Bac. Ab. 694.

Rent-charge extinguished by a release of *part* of the lands.

If a man had a rent-charge to him and to his heirs, issuing out of certain lands, if he purchased any parcel of this land to him and to his heirs, all the rent-charge was extinct: Co. Litt. 147 b. And an acceptance of a devise of part of the lands was a purchase sufficient to cause such extinguishment: *Dennett* v. *Pass*, 1 Scott, 218. But if a man, who has a rent-service, purchased parcel of the land out of which the rent is issuing, this will not extinguish all, but only for the parcel: Gilb. Rents, 151, 152; Co. Litt. 148 a. For a rent-service in such case may be apportioned according to the value of the land. But if a man hold his land of his lord by the service, to render to his lord yearly, at a certain feast, a horse, a golden spear, or a clove, gilliflower, or the like; if in this case the lord purchase parcel of the land, such service is taken away, because such service cannot be served nor apportioned: Co. Litt. 147 b.; and see Noy's Tenures, 6, 7, 8, 292, 293, 294, 9th ed., Noy's Max. So, if the grantee of a rent-charge take a lease of the land for years, he shall not after the years are ended have his election to make this an annuity: *Fulwood* v. *Ward*, Poph. 86. So, wherever an annuity is granted for the performance of any duty or service, and the grantee refuses or neglects to perform it, the annuity becomes extinct: Co. Litt. 204 a. If an annuity be granted

Extinguishment or apportionment by unity of possession.

Extinction of annuities granted for future services, &c.

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to a man for keeping a park, and the game be not preserved through his fault, that is an extinguishment of the annuity: Bro. Abr. *Annuitie*, pl. 49. Upon the same principle, if an annuity be granted *pro decimis*, and the grantee be unjustly disturbed of the tithes, the annuity ceases: for these being the express considerations of the annuities, they are thereby rendered conditional: Co. Litt. 204 a. So again, if an annuity be granted *pro homagio et servitio*, and the grantor disclaim the services in a writ of annuity, the annuity is extinct: Bro. Abr. *Extinguishment*, pl. 37. And if an annuity be granted so long as the grantee is *benevolens*, *proferens*, *et amicabilis* to the grantor, and the grantee labour to put the grantor out of service, it is a forfeiture of the annuity: Bro. Abr. *Annuitie*, pl. 35; and *Double plea*, pl. 100. See *Mattock* v. *Kinglake*, 1 Per. & D. 46.

The doctrine of the extinguishment of rent-charges under the old law gave rise to great difficulties, and often was attended with serious inconvenience. And accordingly, by sect. 10 of the stat. 22 & 23 Vict. c. 35, it was enacted that:—

> "The release of a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release."

A rent in fee does not escheat on failure of heirs, but sinks into the land.

A rent differs materially from land; because the old principles of the feudal law looked upon every modification of landed property, which was considered to be against common right, with a very jealous eye. Upon this principle, the law, in most instances, avoided giving by implication a continuance to the rent, beyond the period expressly fixed for its continuance. Thus, if a rent be granted to a man and his heirs generally, and he die without devising the rent, and without an heir, the rent does not escheat, but sinks into the land: Butl. n. Co. Litt. 298 a. (2); Vaugh. 39. And as a devise, though it only takes effect at the moment of the

Express devise.

testator's death, will prevent an escheat, 3 Cru. Dig. 440, s. 21, 2nd ed., so it seems, by analogy, that a devise will prevent the rent from sinking into the land. But it seems there must be an express devise of the rent, and not a mere authority to sell: *Reeve* v. *The Attorney-General*, 2 Atk. 223, *sed vide contra*, Lord Nottingham's MS. n., Co. Litt. 236 a. (1).

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The reason why the grant of a rent out of lands to a man and his heirs determines on his death without heirs, is, because such grants are, as it is termed in the law-books, *against common right*, Co. Lit. 147, b.; that is, they were against the policy of the feudal structure: Gilb. Rents. 133. For, in their original creation, they were against the reason and policy of that law; since they were so far from contributing to the strength of the kingdom, that they really weakened it, because the tenant, whose land was subject to such charge, was the less able to provide himself for the field, or to perform the duties of the feudal or military tenure; and the grantee of a rent-charge was under no obligation to attend the grantor in the wars, or venture his life for the public, on account of the benefit he received from the grant, as the person who took lands under a feudal donation was obliged to do: Noy's Tenures, 296, 6th ed. It is upon this principle, that when there is not a limitation over in fee, a tenant in tail of a rent acquires, by his recovery (or rather now, by his enrolled conveyance), no more than a base fee, determinable on failure of his issue. But if there be a limitation in fee, after the particular limitation in tail, the grantor has substantially limited the rent in fee; and therefore it is doing him no injustice that the donee should be enabled by his act to acquire an estate in fee simple: Butl. n., Co. Litt. 298, a. (2).

Determination of rent-charge on death of grantee, without heirs.

Apportionment of Rents.]—At common law rent was regarded as not accruing from day to day, but as becoming payable only if the full period in respect of which it was made payable should be accomplished: *Clun's case*, 10 Rep. 126 a; Tud. L. C. Conv. 284. So if a lessor died before the day fixed for payment, the rent became payable, not to his per-

Apportionment of rents in respect of time.

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sonal representatives, but to the heir, devisee or remainderman, as the case might be: *Lord Rockingham* v. *Penrice*, 1 P. Wms. 177. By the stat. 11 Geo. 2, c. 19, s. 15, rents were made apportionable, in the case of *demises*, on the death of tenants for life, and the provisions of that Act were extended by the stat. 4 & 5 Will. 4, c. 22, to the representatives of lessors, and so as to render apportionable all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in the United Kingdom of Great Britain (*o*) and Ireland, made payable or coming due at fixed period under *any instrument that shall be executed after the passing of that Act*, or being a *will or testamentary instrument that shall come into operation after the passing of that Act* (sect. 2). By sect. 3 it is provided that the Act shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable, or policies of assurance of any description. In order to exclude apportionment under stat. 4 & 5 Will. 4, c. 22, there must be either an express direction that apportionment shall not take place, or a gift in terms so explicit that apportionment is clearly impossible consistently with the gift: *Tyrell* v. *Clark*, 2 Drew. 86. A jointure rent-charge, terminating with the life of the jointress, is apportionable under this Act: *Sutton* v. *Ennis*, 4 Ir. Rep., Eq. 325. See also *Trimmer* v. *Danby*, 23 L. J. (N. S.), Ch. 979. Where a grant of a rent-charge by a tenant for life contained an express apportionment clause, in the event of the death of the grantee between two gale days, it was held that the Court could not imply an intention that there should be an apportionment on the death of the grantor: *Leathley* v. *Trench*, 8 Ir. Ch. Rep. 401.

Stat. 4 & 5 Will. 4, c. 22.

Further observations with regard to the operation of this Act will be found, *infra*, tit. LEASES.

(*o*) This Act passed on the 16th June, 1834. It applies to Scotland: *Fordyce* v. *Bridges*, 1 H. L. Ca. 1. It has been repealed as to Ireland by the Landlord and Tenant Amendment Act, 1860 (23 & 24 Vict. c. 154), sect. 104, and Schedule B. See as to apportionment in Ireland, sects. 49 and 50 of that Act.

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By the Apportionment Act, 1870 (33 & 34 Vict. c. 35), it is enacted that:—

Apportionment Act, 1870.

Sect. 2. "From and after the passing of this Act* all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Periodical payments to accrue from day to day, &c.

Sect. 3. "The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before."

*1st August, 1870.

Apportioned part to be payable when next entire portion due.

Sect. 4. "All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity."

Persons shall have the same remedies for recovering apportioned parts as for entire portions.

Sect. 5. "In the construction of this Act the word 'rents' includes rent-service, rent-charge, and rent-seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe. The word 'annuities' includes salaries and pensions . . . . ."

Interpretation of terms.

Sect. 6. "Nothing in this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description."

Act not to apply to policies of assurance;

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Sect. 7. "The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place."

nor where stipulation made to the contrary.

These provisions appear to render the insertion in an annuity deed of any express apportionment clause no longer absolutely necessary (*p*).

Application of Act.

This Act applies to specific as well as to residuary devises or bequests; *Pollock* v. *Pollock*, L. R., 18 Eq. 329; *Hasluck* v. *Pedley*, 19 Eq. 271; and to wills made before the Act, but confirmed by codicils thereto made after the Act: *Capron* v. *Capron*, L. R., 17 Eq. 288; *Constable* v. *Constable*, 11 Ch. D. 681. Indeed, in the case of *Re Cline's Estate*, L. R., 18 Eq. 213, *Malins*, V.-C., held that the Act applies to all instruments whether coming into operation before or not till after the operation of the Act: *Hasluck* v. *Pedley*, *ubi supra*. But Lord *Selborne*, C., took the opposite view: *Jones* v. *Ogle*, L. R., 8 Ch. 192.

The Act applies to the rent of a lease assigned over by a trustee in bankruptcy; *Swansea Bank* v. *Thomas*, 4 Ex. D. 94; but not to profits of a trading partnership; *Jones* v. *Ogle*, L. R., 8 Ch. 192; nor of a newspaper carried on by trustees: *Re Cox*, 9 Ch. D. 159.

INTEREST ON ARREARS OF ANNUITY.

Interest on Arrears of Annuity.]—The early decisions as to the allowance of interest upon arrears of an annuity, down to the case of *Creuze* v. *Lowth*, 4 Br. C. C. 157, 316; *Creuze* v. *Hunter*, 2 Ves. jun. 157, *S. C.*, are not to be relied on as authorities.

In that case Lord *Loughborough* refused to give interest on arrears of an annuity in lieu of dower from the time the master's report was confirmed. And in recent times the Court has generally refused to allow interest on arrears of annuities, whether given by will; see *Taylor* v. *Taylor*, 8 Ha. 120; *Torre* v. *Browne*, 5 H. L. Ca. 555; *Booth* v. *Coulton*, 2 Giff. 514; or by deed; see *Mellish* v. *Mellish*, 14

(*p*) The insertion of apportionment clauses in annuity deeds and bonds is however still common in practice, and is perhaps to be recommended as declaratory of the rights and duties of the parties. These clauses have accordingly been retained in the following precedents, but enclosed in brackets, so that they may be omitted if it is so desired.

Ves. 516; *Booth* v. *Leicester*, 1 Kee. 247. Sometimes, under exceptional circumstances, the Court has allowed interest on such arrears, as where the annuity was secured by a bond with a penalty; see *Newman* v. *Auling*, 3 Atk. 579 (the order in which is given in Seton, p. 960); but not always even in this case: *Lainson* v. *Lainson*, 18 Beav. 7. See also *Earl of Mansfield* v. *Ogle*, 4 De G. & J. 38; *Martyn* v. *Blake*, 3 Dr. & W. 125; *Re Powell*, 10 Ha. 134; *Blogg* v. *Johnson*, L. R., 2 Ch. 295. **Nature and Incidents of Annuities in general.**

Numerous cases in which the Court has, in the exercise of its discretion, under the circumstances of the particular case, allowed or refused interest on arrears of an annuity, are collected in Seton on Decrees, at p. 962, to which the reader is referred for further information on the subject. The stat. 3 & 4 Will. 4, c. 42, s. 28, enabling juries to allow interest, does not affect the discretion of the Court: *Re Powell's Trust*, 10 Ha. 134; *Earl of Mansfield* v. *Ogle*, 4 De G. & J. 38; *Spartate* v. *Constadini*, 20 W. R. 823. See *Hyde* v. *Price*, 8 Sim. 578, and *Willcocks* v. *Butcher*, 16 Sim. 366.

In *Hyde* v. *Price*, an annuity had been granted in 1795 for the life of the grantor, secured by his bond and a judgment. The grantor died intestate in 1810, leaving large arrears due on the annuity, and assets, consisting of a fund in Court, which accumulated from that time. In 1834, administration was taken out to the grantor, and the bill was filed. Interest at five per cent. was given. *Hyde* v. *Price*.

Interest could not generally be recovered at law upon a judgment, *Jarrold* v. *Rowe*, 8 Price, 582, nor in equity, unless there were some special circumstances or hardship, &c., which a mere delay, caused by the progress of the cause, did not amount to; *Lewis* v. *Morgan*, 3 You. & J. 230, 394; *Berrington* v. *Evans*, You. 276; or unless the debtor was applying for relief against the creditor. But now, by the stat. 1 & 2 Vict. c. 110, s. 17 (*infra*, tit. Mortgages), interest at four per cent. from the time of entering up the judgment as against the debtor, and from the time of registering the judgment as against the interests of purchasers and mortgagees, with notice Interest on a judgment. 1 & 2 Vict. c. 110, s. 17.

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(2 & 3 Vict. c. 11, s. 5), may be levied in execution upon the judgment. The original debt is merged in the judgment, and the claimant is only entitled to interest at four per cent. unless there is a special provision to the contrary in the instrument creating the debt: *Re European Central Railway Co.* (C. A.), 4 Ch. D. 33; and see *Re Agriculturist, &c. Co.*, Ib. 34, note.

Office and Powers of a Receiver.

Difference between a receiver appointed by deed and a receiver appointed by the Court.

Receiver.]—The nature of the office, power, and authority of a receiver appointed by deed, and that of a receiver appointed by the Court (*p*), are totally different; for, as the first derives his authority wholly from the deed, he cannot go beyond the powers thereby given. The other is an officer of the Court, and acts under its direction; and therefore being in many respects guarded and protected by its authority, he is invested with some powers, which our law of tenures renders impossible for private individuals to confer. The numerous cases to be found in the reports respecting receivers relate almost exclusively to those appointed by the Court; but the principles

(*p*) As to the considerations by which the Court is influenced in the exercise of this branch of its jurisdiction, see *Skip* v. *Harwood*, 3 Atk. 564; *Davis* v. *Duke of Marlborough*, 1 Swanst. 83; 2 Id. 115; *White* v. *Bishop of Peterborough*, 3 Id. 109; *S. C.*, Jac. 402; *Stitwell* v. *Williams*, 6 Mad. 49; *S. C.*, *nom. Stilwell* v. *Wilkins*, Jac. 280; *Rowe* v. *Wood*, 2 Jac. & W. at p. 557; *Tyson* v. *Fairclough*, 2 Sim. & St. 142; *Bertie* v. *Lord Abingdon*, 3 Mer. 560; *S. C.*, 8 Beav. 53; *Const* v. *Harris*, Turn. & R. at p. 517; *Watkins* v. *Brent*, 1 Myl. & Cr. 97, 103; *Skinners' Company* v. *Irish Society*, Id. 162; *Metcalfe* v. *Archbishop of York*, Id. 547; *Marr* v. *Littlewood*, 2 Myl. & Cr. 454; *Woodyatt* v. *Gresley*, 8 Sim. 180; *Richards* v. *Perkins*, 3 You. & C. 299; *Aberdeen* v. *Chitty*, Id. 379; *George* v. *Evans*, 4 Id. 211; *Wood* v. *Hitchings*, 2 Beav. 289; *Holmes* v. *Bell*, Id. 298; *Manly* v. *Hawkins*, 1 Dr. & W. 363; *Cupit* v. *Jackson*, 13 Pr. 721; *Sollory* v. *Leaver*, L. R., 9 Eq. 22; *Kelsey* v. *Kelsey*, L. R., 17 Eq. 495. Under the Judicature Act, 1873, sect. 25 (8), a receiver may be appointed by interlocutory order in all cases in which it shall appear to the Court to be just or convenient. See *Re Anglo-Italian Bank* v. *Davies* (C. A.), 9 Ch. D. 275; *Re North London Railway* v. *Great Northern Railway* (C. A.), 11 Q. B. D. 30; even though the title to the property in question is disputed: *Berry* v. *Keen*, 21 L. J., Ch. 912. See also, Seton, 424, *seq.*, and the Rules of the Supreme Court, 1883, Ord. L. rr. 16—22.

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which regulate their proceedings have only a partial connexion by analogy to a receiver appointed by deed. It is for the above reason that, in a deed of receivership, the powers and liabilities of the receiver are clearly defined.

The Court will not appoint a trustee receiver.

The Court will not appoint a trustee a receiver of the estate where he is an accounting party, because he ought to check the receiver: *Anonymous*, 3 Ves. 515. Nor will the Court appoint a trustee and executor receiver, although there are others joined with him in the trust; for the testator meant to have the benefit of the exertion and management of all whom he named, and it would be a mode of giving a trustee emolument who ought to manage and receive without gratuity: ——— v. *Jolland*, 8 Ves. 72. And in case the trustee has, either in himself or jointly with another, a power of leasing, the *cestui que trust* would lose the benefit of the trustee's knowledge and superintendence as a check, and he would be exposed to the temptation of immediate increase of emolument by an immediate increase of rent: *Sutton* v. *Jones*, 15 Ves. 588. However, the Court will appoint a trustee receiver, with emolument, if no other person can be procured; *Sykes* v. *Hastings*, 11 Ves. 364; or under other special circumstances: *Marshall* v. *Holloway*, 2 Swanst. 452; *Morison* v. *Morison*, 4 Myl. & Cr. 215; *Bury* v. *Newport*, 23 Beav. 30.

Whether a trustee may be receiver.

It is no objection to a trustee being appointed a receiver if he be a trustee merely for preserving contingent remainders, or if he be a trustee with a power of sale and exchange at a future period, and which cannot be exercised during his receivership: *Sutton* v. *Jones*, 15 Ves. 587. A party to an action will not generally be appointed receiver without the consent of the other parties, *Davis* v. *Marlborough*, 2 Sw. 118; *Re Lloyd*, 12 Ch. D. 447, unless it appears that such appointment would be beneficial to the estate: *Hyde* v. *Warden*, 1 Ex. D. 309; *Taylor* v. *Eckersley*, 2 Ch. D. 302. A party so appointed will be required to act without salary: *Blakeney* v. *Dufaux*, 15 Beav. 40; *Sargant* v. *Read*, 1 Ch. D. 600. The solicitor in the cause cannot be a receiver; *Garland* v.

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Garland, 2 Ves. jun. 137; *Wilson* v. *Poe*, 1 Hog. 322; *Watson* v. *Arundel*, Ir. Rep., 9 Eq. 324; *Re Lloyd*, *ubi supra;* nor a solicitor under a commission of lunacy; *Ex parte Pincke*, 2 Mar. 452; nor the next friend of infant plaintiffs; *Stone* v. *Wishart*, 2 Mad. 64; nor can a peer: *Attorney-General* v. *Gee*, 2 Ves. & B. 208. It is conceived that members of the House of Commons ought not to be appointed receivers, inasmuch as they are protected by privilege of Parliament from process for contempt: *Long Wellesley's case*, 2 R. & M. 639; *Lechmere Charlton's case*, 2 M. & C. 316. See also Fisher on Mortgages, 4th ed. 376.

The circumstances under which the Court will appoint as receiver one of the members of a dissolved partnership was fully considered in *Sargant* v. *Read*, 1 Ch. D. 600.

These principles do not, however, extend to a receiver appointed by deed, where the persons beneficially interested at the time are *sui juris;* and therefore in an annuity, mortgage, or any other transaction, a trustee of the estate may be appointed a receiver; but, in that case, the amount of the compensation which he is to have as receiver should be distinctly stated in the deed: for as trustee he is entitled to no allowance for his trouble, unless there be in the deed a special provision for that purpose. However, it is not usual in practice in any case to appoint a trustee receiver by deed.

Annuitant is not usually appointed as receiver.

A mortgagee cannot stipulate to be receiver of the rents and profits with a commission: *Chambers* v. *Goldwin*, 9 Ves. at p. 272; *French* v. *Baron*, 2 Atk. 120; *Leith* v. *Irvine*, 1 Myl. & K. 277; *Broad* v. *Selfe*, 9 Jur., N. S. 885; *Barrett* v. *Hartley*, L. R., 2 Eq. at p. 795; *infra*, tit. MORTGAGES. It has been said that on principle that objection cannot extend to an annuitant, because the annuity is not in the nature of a loan. However, it is not usual to appoint the annuitant the receiver, and the present editor conceives that the same reasoning might well be held to apply to an annuitant as to a mortgagee, for why should the annuitant be allowed to make a profit beyond his annuity any more than a mortgagee beyond his interest? As to whether the transaction

is a loan or a purchase of an annuity, see *Bulwer* v. *Astley*, 1 Ph. 422; *Verner* v. *Winstanley*, 2 Sch. & Lef. 393; *Louguet* v. *Seawen*, 1 Ves. sen. 402; *Joy* v. *Birch*, 4 Cl. & F. 57; also Sugd. Law Pro. 667 *et seq.* Nature and Incidents of Annuities in general.

If no receiver has been previously appointed, and from the nature of the property one be requisite, the person having the legal estate may appoint a receiver when the annuity becomes in arrear: *Jenkins* v. *Milford*, 1 Jac. & Walk. 629. For a mortgagee in possession, or a trustee, and consequently an annuitant, where he is himself the trustee, is not bound to be his own bailiff; and if either of them manage the estate himself, there is no allowance made to him for his care and pains; but if either of them employ a skilful bailiff, and for his trouble give him a reasonable compensation out of the rents and profits, the Court allows of the payment: *Bonithon* v. *Hockmore*, 1 Vern. 316. Remuneration has been allowed by the Court to a receiver appointed by deed, at the rate of one shilling in the pound on the rents received where the rents arose from several small houses; *Davis* v. *Dendy*, 3 Mad. 170; but where the rent arises from large farms, sixpence in the pound is sometimes the stipulated allowance. In the case of *Day* v. *Croft*, 2 Beav. 488, where the sums received consisted partly of gross sums paid by mortgagees and annuitants for principal money, and partly of interest and dividends of stock, and rents of leasehold houses, some difficult to be collected and others not, Lord *Langdale*, M. R., said that he had made inquiries of the masters on the subject, and all of them had sent him certificates. He found that there was no general rule. Most frequently, where there were rents of freehold or leasehold estates to be received, a sum of 5*l.* per cent. on the amount of the receipts was allowed. If there was any special difficulty, on account of the tenements being extremely small, and the payments frequent, as weekly payments, and the like, an addition to the 5*l.* per cent. was allowed; but if there was very great facility in receiving the rents, less than 5*l.* per cent. commission was allowed. One of the masters had certified to him a case in which he had allowed Receiver's salary.

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only 4*l.* per cent. for the receipts of the rents and profits of freehold and leasehold estates. Another had mentioned a case where there was only a single rent of 300*l.* a year to be received, and in which the receiver for the first year was allowed much more than in the succeeding years. So that there was no general and universal rule that 5*l.* per cent. should be allowed for the receipts of the rents and profits, the allowance in cases of extraordinary difficulty being increased, and in cases of extraordinary facility diminished. Generally speaking, in the greater number of instances they were allowed 2*l.* 10*s.* per cent. for receiving gross sums; but, on many occasions, that was reduced to 1*l.* 10*s.* per cent. It therefore appeared that the masters, as indeed they ought, considered what was fit and proper to be allowed, having regard to the trouble and the degree of responsibility of the receiver.

And now, under the Rules of the Supreme Court, 1883, Ord. L. r. 16, the receiver shall, unless otherwise ordered, be allowed a proper salary or allowance; and as to what has been the practice, see *Macolm* v. *O'Callaghan*, 3 M. & Cr. 52; *Gilbert* v. *Deneley*, 3 Scott, N. R. 364; *Pilkington* v. *Baker*, 24 W. R. 234; *Ex parte Royle*, 23 W. R. 903.

Allowance to a trustee for expenses.

A trustee or an executor, having no allowance for his trouble, is allowed many charges and expenses which a receiver who has a salary is not allowed: *Potts* v. *Leighton*, 15 Ves. 276. But a trustee may be allowed a compensation for his trouble, if there be an express provision for that purpose in the deed creating the trust, but not it seems if the agreement for an allowance to a trustee be subsequent, except it be under extraordinary circumstances: *Gould* v. *Fleetwood*, 3 P. Wms. 251, n.; *Ayliffe* v. *Murray*, 2 Atk. at p. 60. It is otherwise as to a mortgagee: *Chambers* v. *Goldwin*, 9 Ves. at p. 271. And where the mortgagee was the attorney of the mortgagor, and in an account settled between them had charged poundage for having received the rents, which were very small and the collection troublesome, and in consequence thereof the mortgagee was entitled to have a receiver at the mortgagor's expense, the charge was disallowed: *Langstaffe* v. *Fenwick*, 10

Ves. 405. So in *Carew* v. *Johnston*, 2 Scho. & Lef. 301, an *ex parte* report of the master charged receiver's fees; but Lord *Redesdale* said, a mortgagee is not entitled to receiver's fees for himself; he is, if he pays a receiver. But the evidence was that he received for himself. This, therefore, was taking an advantage to himself which the mortgagee had no right to.

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In *Godfrey* v. *Watson*, 3 Atk. at p. 518, Lord *Hardwicke* said, that a mortgagee shall not be allowed for his trouble in receiving the rents of the estate himself; but if an estate lies at such a distance from the place of his residence that he must have employed a bailiff if it had been his own, he shall then be allowed such sums as he has paid to a bailiff to receive the rents of this estate. The modern rule does not seem to depend so much on the degree of distance of the estate from the residence of the mortgagee, &c., as the degree of trouble. Thus, where a mortgage of twenty leasehold houses in the parish of St. Andrew, Holborn, was assigned to a trustee who lived in Chancery Lane, near the houses, in trust for a person (since deceased) who resided at Dorking; Sir *John Leach*, Vice-Chancellor, said: "A mortgagee cannot be paid as a receiver, nor can he generally and universally, when he takes possession, appoint a receiver. But if the nature of the estate be such, that great time and trouble must be sacrificed in the receipt of the rents, he may appoint a receiver:" *Davis* v. *Dendy*, 3 Mad. at p. 172.

The necessity for a receiver depends on trouble necessary to collect the rents.

If a portion of the estate can be got in without passing through the hands of the receiver, the Court will allow it to be done in order to save the receiver's poundage: *Haigh* v. *Grattan*, 1 Beav. 201.

Trustees and executors, not beneficially interested, cannot be generally advised to appoint a receiver, where they have no authority for that purpose; for, unless the deed or will authorizes the appointment, the trustee or other person appointing the receiver will be answerable for him in all events: *Anonymous*, 12 Mod. 560. But if the deed or will authorizes the appointment of a receiver or agent, and one be appointed, who at the time of his appointment is

Unauthorized appointment of receiver.

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solvent and in good circumstances, though he should afterwards become insolvent, the person appointing shall not answer for him. However, it is otherwise if he were not solvent at the time he was appointed: 12 Mod. 560. But where a debtor conveyed an estate to two trustees, appointed by his creditors in pursuance of a previous agreement, and the creditors permitted the acting trustee to retain in his hands, for about three years, a sum belonging to the trust fund, which he had received out of the rents of the estate; Lord *Manners* held, on the trustees' bankruptcy, that, as the debtor did not appoint the trustees, and had no power to remove them, the loss must fall on the creditors. For the creditors being the persons most interested in the conduct and punctuality of those trustees, and in the manner the rents were to be applied, the trustees must therefore be considered as the agents of the creditors who appointed them: *Hutchinson* v. *Lord Massareene*, 2 Ball & Bea. 54. See also *Anonymous*, 1 Salk. 153; *Juxon* v. *Brian*, Prec. Chan. 143; *Carter* v. *Barnardiston*, 1 P. Wms. 518. But where, under a creditors' deed, a receiver appointed by the inspectors made default, Lord *Romilly*, M. R., held that the receiver was not their agent, and that they were not liable: *Hobson* v. *Jones*, L. R., 9 Eq. 456.

Receiver permitted to retain the rents an unreasonable time and becoming insolvent.

Where land has been conveyed to a railway company under the Lands Clauses Act, in consideration of a rent-charge, the appointment of a receiver of all costs, &c. of the undertaking, in a suit by the owner of the rent-charge on behalf of himself and all other the owners of similar rent-charges who should come in and contribute, will not prevent the Court from giving the owner of a rent-charge who has not come in, leave to distrain: *Eyton* v. *Denbigh, &c. Co.*, L. R., 6 Eq. 14; and see Ibid. 488.

Accounts.

Receivers appointed by the Court were formerly required annually to pass their accounts and pay in their balances. But under the present practice the Court or judge fixes the days upon which (annually, or at longer or shorter periods) the receiver is to pass his accounts: Rules of the Supreme Court, 1883, Ord. L. r. 18. Receivers appointed by deed

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are not subject to any rule as to passing accounts at particular times, and therefore it is always prudent to call on them to account regularly as the money is received. The Court cannot order in a summary way the executor of a deceased receiver to bring in and pass his testator's accounts, and to pay the balance to be found due out of the assets: *Jenkins* v. *Briant*, 7 Sim. 171. See, further, as to passing of accounts by receivers appointed by the Court, Kerr on Receivers, p. 171.

Arrears, &c. due at receiver's appointment.

A receiver, when appointed by the Court, is entitled to all the rents in arrear: but where a receiver had been appointed at the instance of a mortgagee of a West India estate, it was held, that he was not entitled to the produce of crops severed and shipped to the mortgagor's consignee previously to the appointment, but not received or sold until after that time: *Codrington* v. *Johnstone*, 1 Beav. 520.

Loss occasioned by a receiver appointed by the Court.

In *Rigge* v. *Bowater*, 3 Bro. C. C. 365, Lord *Thurlow* intimated his opinion (without deciding the case), that if a receiver be appointed by the Court, upon the applicatien of a mortgagee or other incumbrancer, and he afterwards embezzle or otherwise waste the rents and profits, the loss must fall on the mortgagor. The reason is, it seems, the receiver is the officer of the Court: *Hutchinson* v. *Lord Massareene*, 2 Ball & Bea. 55.

Under what circumstances the Court will appoint a receiver.

However, if there be no receiver appointed by the deed, and the mortgagee has the legal estate, he cannot have a receiver appointed by the Court, but he must recover the possession by ejectment: *Berney* v. *Sewell*, 1 Jac. & Walk. at p. 648. Yet if there be a prior mortgagee who is not in possession, a second or equitable mortgagee may have a receiver appointed by the Court, without prejudice to the prior mortgagee's taking possession; but if he be in possession, the second mortgagee cannot have a receiver appointed; he must redeem him; and then, in taking the accounts, the prior mortgagee will not be allowed any sums he may have paid over to the mortgagor, after notice of the subsequent incumbrance: Ibid. 649; *Bryan* v. *Cormick*, 1 Cox, 422; *Dalmer* v. *Dashwood*,

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2 Cox, 378; *Quarrell* v. *Beckford*, 13 Ves. 377; *Parker* v. *Calcraft*, 6 Mad. 11.

In a recent case a receiver has been appointed of the whole of a property comprised in a mortgage, and as to part of which the plaintiff was legal, and as to the residue equitable, mortgagee: *Pease* v. *Fletcher*, 1 Ch. D. 273; and see *post*, tit. MORTGAGES; and *Rowe* v. *Wood*, 2 Jac. & W. at p. 557. An equitable incumbrancer may have a receiver notwithstanding the mortgagor is out of the jurisdiction: *Tanfield* v. *Irvine*, 2 Russ. 149. See *Gibbons* v. *Mainwaring*, 9 Sim. 77; *Holmes* v. *Bell*, 2 Beav. 298.

But in the case of *Sollory* v. *Leaver*, L. R., 9 Eq. 22, where a testator gave an annuity, and subject thereto gave all his freehold property to T. absolutely, it was held that inasmuch as a power of distress was annexed to the annuity by the stat. 4 Geo. 2, c. 28, s. 5, the annuitant was in a position to help himself, and was not entitled to have a receiver appointed. See *Buxton* v. *Monkhouse*, 9 Coop. 41, where it was decided that a receiver would not be appointed where there was an annuity secured on leaseholds, with an express power of distress. See also *Kelsey* v. *Kelsey*, L. R., 17 Eq. 495.

Distress.

Generally, a distress for rent must be made by, or in the name of the person appearing to have the immediate legal estate in reversion, *Hughes* v. *Hughes*, 3 Bro. C. C. 87, as he alone possesses a privity of estate with the tenant in possession; *S. C.*, 1 Ves. jun. 161, and who, consequently, is the tenant of the person having that legal estate: *Griffith* v. *Griffith*, 2 Ves. sen. 401. So that if, when an annuity is granted, &c., and secured by a demise to a trustee, and the grantor appoints a receiver by way of additional security, the trustee do not join in the demise to the receiver, the receiver must distrain as his bailiff; in which case, if there be no previous authority, a subsequent assent would excuse him from being punished as a trespasser: 2 Leon. 196. But a previous authority in writing is always desirable when a distress is made by a bailiff; for he ought, if he be required, to show the cause why he made

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the distress; yet if he be not required, then he is not bound to show it. And if the bailiff, upon making the distress, shows the cause and reason of it, he cannot afterwards vary from it; but if he distrain generally, without showing any cause, then he is at liberty afterwards to show what cause he thinks fit: *Buller's case*, 1 Leon. 50. See further, Wms. n., 1 Saund. 347, c. (4). To prevent the necessity of having an express authority from the trustee or his representatives, every time a distress is made, and to prevent the trouble and delay which must be thereby occasioned, it seems prudent invariably to make the trustee a party to the appointment, if it be in the nature of a power of attorney.

Appointment by demise of the trustee and grantor.

But, as it appears that an appointment of a receiver by demise is preferable to a simple appointment in the nature of a power of attorney, and as the trustee has the immediate legal estate in reversion, expectant on the estates of the tenants in possession, it seems generally prudent to make the trustee a party to the demise to the receiver.

So, if the appointment of a receiver be in the annuity or mortgage deed, and an attendant term is assigned or noticed in the same deed, it seems, for the above reasons, equally necessary that the trustee of the attendant term should join in the appointment or demise, whichever form be adopted.

Appointment of receiver where an estate has been previously incumbered.

But if an annuity is charged, or a mortgage made on an estate which has been previously incumbered, and the person having the legal estate will not join in the demise to the receiver, where, from the nature of the property, it is desirable to have one, then he is sometimes appointed without a demise; and the prior charges are either recited in the deed, or stated by way of schedule, and the receiver directed to apply the rents, in the first place, in paying the prior charges, and, in the next place, in paying the annuity or mortgage. This may be done either by the annuity, or mortgage deed, or by a separate deed, according to the circumstances.

Copyholds.

So, a receiver of copyholds is always appointed by a deed in the nature of a power of attorney.

Distress by receiver.

It seems that as to any lease made before the con-

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veyance in trust to secure the annuity, &c., or as to any lease made afterwards by the grant or by parol, or by deed not indented (*q*), or as to a tenant from year to year, the receiver may distrain as the attorney of the trustee alone, as he has the immediate legal estate in reversion; and that as to any lease made by the grantor only by indenture, after the conveyance in trust to secure the annuity, the receiver may distrain as the attorney of the grantor alone, because the lessee would be estopped by the indenture from pleading that his grantor had not the legal estate: Wms. n., 2 Saund. 418 a. And if a receiver who has no estate grants a lease, the lessee is estopped from objecting to his right to distrain: *Dancer* v. *Hastings*, 4 Bing. 2. But the authority of the receiver ceases, as to each of the persons appointing, on their respective deaths. A receiver is entitled to the possession of the estate, holding it where the right is in dispute for the party who in the end proves to be entitled: *Sharp* v. *Carter*, 3 P. Wms. 375. But he cannot bring ejectment against any tenant without the authority of the Court; *Wynn* v. *Lord Newborough*, 3 Br. C. C. 88; 1 Ves. jun. 164; and, though it is a contempt to bring ejectment against him, *Angel* v. *Smith*, 9 Ves. 335; see *Johnes* v. *Claughton*, Jac. 573; *Brooks* v. *Greathead*, 1 Jac. & W. 176, he cannot defend any action without leave: Ib.; *Swaby* v. *Dickon*, 5 Sim. 629; *Malcolm* v. *O'Callaghan*, 3 Myl. & Cr. 52. But he may distrain for rent in arrear; *Brandon* v. *Brandon*, 5 Mad. 473; but not for arrears beyond the year: Ib.

Receiver's right to possession, &c.

Authority to pay for repairs, &c.

It seems prudent to authorize the receiver to pay taxes, &c., and the expenses of repairs. For without an express authority he cannot make those payments. A receiver appointed by the Court will not be permitted to lay out more than a very small sum at his own discretion, *Waters* v. *Taylor*, 15 Ves. 26, without a previous application to the Court: *Attorney-*

(*q*) That is to say, by deed to which the lessee is not a party, for the mere indenting of a deed is immaterial to its effect as an estoppel.

General v. *Vigor*, 11 Ves. 563. But where the master reported that a previous expenditure was for the lasting benefit of the estate, and it was made by the direction of the trustees, an order for the allowance was made. *Blunt* v. *Clitherow*, 6 Ves. 799. See further, as to extraordinary expenditures, &c. by a receiver, *Malcolm* v. *O'Callaghan*, 3 Myl. & Cr. 52; *Keys* v. *Keys*, 1 Beav. 425. **Nature and Incidents of Annuities in general.**

Although a receiver appointed by the Court cannot proceed in ejectment against the tenants of the estate, without application to the Court, yet a receiver, who has a term conferring on him the immediate reversion, may maintain an ejectment in his own name, or a receiver under a power of attorney may maintain an ejectment in the name of the person appointing him, if such person has the immediate legal estate in reversion. So, an ejectment cannot be brought against the tenants in possession, where there is a receiver appointed by the Court, without the leave of the Court, under the pain of being committed for a contempt; *Anonymous*, 6 Ves. 287; *Angel* v. *Smith*, 9 Ves. at p. 340; but it is, of course, otherwise where a receiver is appointed by deed. **Ejectment against receiver.**

A receiver, whether appointed by the Court or by deed, is not answerable for involuntary losses: *Knight* v. *Lord Plymouth*, 3 Atk. 480; 1 Dick. 120; *Rowth* v. *Howell*, 3 Ves. 565; *Ex parte Belchier*, Amb. 218; *Wren* v. *Kirton*, 11 Ves. 377. See *Wood* v. *Wood*, 4 Russ. 558; *Keys* v. *Keys*, 1 Beav. 425. **Involuntary losses.**

In the case of *Salway* v. *Salway*, 4 Russ. 60, an attempt was made to fix a receiver, appointed by the Court, with a loss arising from the failure of bankers, on the ground, among others, that he had placed the money under the control of other persons, and that interest had been made and proved on it; but, as it appeared that the money had been merely placed to the joint account of the receiver's sureties, in order to insure its due appropriation, and as the receiver himself was ignorant that interest had been made on it, not being aware that the bankers allowed interest on deposit notes; Sir *J. Leach*, M.R., **Salway v. Salway.**

Nature and Incidents of Annuities in general.

held that the receiver was not, on these accounts, responsible for the loss. The debt, including interest, had been proved against the bankers' estate by one of the sureties. But the decision of the Master of the Rolls was, on appeal, reversed by Lord *Brougham*, C.; *Salway* v. *Salway*, 2 Russ. & M. 215; and that reversal was affirmed by the House of Lords: *White* v. *Baugh*, 3 Cl. & Fin. 44; 9 Bligh, 181, *S. C.* "I could not," said Lord *Brougham*, "affirm the decision of the Court below without laying down this rule—that a receiver under the control of the Court, and paid out of the estate, is nevertheless entitled to substitute for his own discretion, responsibility, and integrity, the discretion, responsibility, and integrity of a stranger. Will it be said that he is able to exercise that discretion when he has tied up his own hands, and can no longer exercise it himself, but must apply for the consent and co-operation of another? The control was not given without an object, for it was given partly to induce the sureties to undertake the responsibility." And Lord *Lyndhurst* observed that the Court exercises a much stricter vigilance over receivers whom it appoints, and who are paid for the performance of their duty, than even ordinary trustees.

Receiver must not delegate his powers.

Money due from receiver a debt of record.

In the recent case of *Seagram* v. *Tuck*, 18 Ch. D. 296, it was held that moneys due from a receiver, whether an ascertained balance or not, so long as the recognizance lasts, are a debt of record; and *Kay*, J., further said that, even in case of the recognizances being vacated, he "should be strongly inclined to hold that as to any money due from a receiver and not brought into account, either through mistake or through fraud, he would be a trustee for the persons entitled to the money," and that therefore the Statute of Limitations would be no defence.

Registration of Annuities.

Registration.]—Previous to the repeal of the Usury Laws it was a common practice to raise money by means of grants of annuities in consideration of the payment of sums purporting to be purchase-moneys, and which in point of fact constituted advances, for

Nature and Incidents of Annuities in general.

which the annuities stood in lieu of interest. In order to regulate these transactions, and to ensure their publicity, it was provided by the stat. 53 Geo. 3, c. 141, that all grants of annuities for money, or money's worth (with certain exceptions) shall be void, unless registered in the Court of Chancery within thirty days, according to the form of memorial, and other formalities prescribed by the Act. These restrictions were removed in 1854 by the same statute, whereby the Usury Laws were repealed, viz., 17 & 18 Vict. c. 90. But by the stat. 18 & 19 Vict. c. 15, which passed on the 26th April, 1855, after reciting the 53 Geo. 3, c. 141, it is enacted that:—

Life annuities and rent-charges not to affect lands as to purchase, &c. until memorandum left with senior master.

Sect. 12. "Any annuity or rent-charge granted after the passing of this Act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the date of the deed, bond, instrument, or assurance whereby the annuity or rent-charge is granted, and the annual sum or sums to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster (*r*), who shall forthwith enter the particulars aforesaid in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by the annuity or rent-charge, together with the year and day of the month when every such memorandum or minute is so left with him; and he shall be entitled for every such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book, together with the other books or registers in the office, on payment of the sum of one shilling."

Searches may be made by the parties themselves.

Sect. 13. "The searches of the several registers, by the said recited Acts, or by this Act authorized to be made for the sum of one shilling, may be made by the parties themselves under proper regulations in the office; and the sum of one shilling only shall be payable on one search, although more names than one shall be searched for, where such names relate to the same purchase, mortgage, or other transaction."

(*r*) Now at the Central Office.

Nature and Incidents of Annuities in general.

Sect. 14. "The provisions of this Act shall not extend to require the registry of annuities or rent-charges given by will."

Annuities, &c. given by will excepted.

Notice of unregistered annuity.

It was decided by *James*, *Baggallay*, and *Bramwell*, LL.J. (reversing the decision of *Jessel*, M.R.), that sect. 12 of this Act does not render an unregistered annuity void as against subsequent incumbrancers who have had notice of the annuity: *Greaves* v. *Tofield*, 14 Ch. D. 563. As to entry of satisfaction of an annuity, see 23 & 24 Vict. c. 115, s. 2, see *ante*, p. 107.

STAMPS.

Stamps.]—An instrument creating an annuity by way of mortgage on sale must be stamped accordingly: see tits. MORTGAGE, PURCHASE; see also the Stamp Act, 1870 (33 & 34 Vict. c. 97), ss. 75, 105. By the schedule to that Act it is provided that the following duties shall be payable:—

BOND, COVENANT, OR INSTRUMENT OF ANY KIND WHATSOEVER.

(1) Being the only or principal or primary security for any annuity (*except upon the original creation thereof by way of sale or security*), or of any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained ..... } The same ad valorem duty as a bond or covenant for such total amount.

For the term of life or any other indefinite period.

For every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable ..... £ 0 *s.* 2 *d.* 6

(2) Being a collateral or auxiliary or additional or substituted security for any of the above mentioned purposes where the principal or primary instrument is duly stamped.

Where the total amount to be ultimately payable can be ascertained ..... } The same ad valorem duty as a bond or covenant of the same kind for such total amount.

In any other case:

For every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable .... £ 0 *s.* 0 *d.* 6

PRECEDENTS.

I. *BOND for securing an* ANNUITY *for the* GRANTOR'S LIFE; *without any other Security, and* REPURCHASABLE.

KNOW ALL MEN by these presents, that I [*obligor*], of &c., am bound to [*obligee*], of &c., in the sum of [*double the purchase-money*], to be paid to the said [*obligee*], or to his attorney, executors, administrators, or assigns: For which payment I bind myself (*a*) by these presents. Sealed with my seal. Dated this ——— day of ———, 18—. Obligation from one to one.

WHEREAS the above-named [*obligee*] has contracted with the above-bounden [*obligor*], for the purchase of an annuity of £———, to be paid to the said [*obligee*], his executors, administrators, and assigns, during the life of the said [*obligor*], for the price of £———; AND which sum of £——— the said [*obligee*] has, on the day of the date of the above-written bond, paid to the said [*obligor*], which he the said [*obligor*] hereby acknowledges. Recital of contract for purchase. Recital of payment.

NOW THE CONDITION of the above-written bond is such, that if the said [*obligor*] shall pay unto the said [*obligee*], his executors, administrators, or assigns, during the life of him the said [*obligor*], One annuity or yearly sum of £———, clear of all deductions by equal quarterly payments, on the ——— day ———, &c., in every year; the first payment thereof to be made on the ——— day ——— next ensuing the date of the above-written bond: [AND ALSO, if the heirs, executors, or administrators of the said [*obligor*] should pay unto the said [*obligee*], his executors, administrators, or assigns, in case the said [*obligor*] should depart this life on any day on which any quarterly payment of the said annuity or yearly sum of £——— shall become due, the whole of such quarterly payment; And if on any other day, in case such Condition, payment of annuity, and proportional part.

(*a*) The heirs of the obligor are bound, though not here expressly mentioned. See Conveyancing, &c. Act, 1881, sect. 59, and *post*, tit. BOND.

I. Bond only for Grantor's Life, Repurchasable.

day should happen before any quarterly payment of the said annuity or yearly sum should have become due, Then a proportional part of the quarterly payment of the said annuity or yearly sum of £———, to be computed from the day of the date of the above-written bond to the day of the death of the said [*obligor*]; But in case any quarterly payment of such annuity or yearly sum of £——— should have become due at the time of the decease of the said [*obligor*], then from such of the said quarterly days of payment, next preceding the day of the death of the said [*obligor*], to the day of his decease (*b*)]; or if the said [*obligor*] shall at any time [after the expiration of three years from the date of the above-written bond] give unto the said [*obligee*], his executors, administrators, or assigns, notice in writing, by the space of six calendar months, of his intention to repurchase the said annuity of £———; and shall at the end of the said six calendar months from the time such notice shall be given as aforesaid, pay unto the said [*obligee*], his executors, administrators, or assigns, all moneys that shall then be due for the arrears of the said annuity, [together with a proportional part thereof from the last day of payment preceding such repurchase,] up to the day of repurchasing the same as aforesaid; and also the sum of £——— and £———, being the original purchase-money of the said annuity, and half of a year's annuity in advance, as and in full for the repurchase of the said annuity of £——— above secured; Then the above-written bond shall be void and of no effect, otherwise shall be and remain in full force.

Declaration enabling grantor to repurchase, on giving six months' notice, and repaying original purchase-money, and half a year's annuity in advance.

SEALED AND DELIVERED in the presence of }

II. *BOND for securing an* ANNUITY *to a Man for Life, and to his Wife if she should survive him, Re-purchasable on Repayment of the Amount of the Price of the Annuity.*

Obligation.

KNOW ALL MEN (*obligation, ut ante*, p. 705).

Recital of contract of purchase.

WHEREAS the above-named [*obligee*] has contracted with the above-bounden [*obligor*], for the purchase of an annuity of

(*b*) As to omitting apportionment clauses, *vide ante*, p. 688.

£———, to be paid to the said [*obligee*], during his life and after his death to [*wife*] his wife, during her life, if she should survive him, at the price of £———. AND WHEREAS upon the purchase of the said annuity, it was agreed that for more effectually securing the payment thereof to the said [*obligee*], the same should be secured by an indenture, bearing even date with the above-written bond or obligation, and made between the said [*obligor*], of the first part, the said [*obligee*], of the second part, and [*trustee*], of &c., of the third part: AND also by the bond and warrant of attorney of the said [*obligor*]. AND WHEREAS the said [*obligee*] has, on the day above written, paid to the said [*obligor*] the said sum of £———, which the said [*obligor*] hereby acknowledges.

II. Bond for Two Lives, Collaterally Secured, and Repurchasable on replacing Stock.

Reference to collateral securities.

Of paying consideration.

NOW THE CONDITION of the above-written bond is such, that if the said [*obligor*], his heirs, executors, or administrators, should pay unto the said [*obligee*] during his life, and after his death to [*wife*], his wife, if she should survive him, an annuity or yearly sum of £———, clear of all deductions, by equal quarterly payments, on the ——— day of ———, &c., in every year, the first payment to be made on the ——— day of ——— next ensuing the day above written: AND ALSO, should pay unto the executors, administrators, or assigns, of the said [*obligee*] or [*wife*] his wife, in case either of them the said [*obligee*] or [*wife*] his wife, should depart this life on any day on which any quarterly payment of the said annuity shall become due, the whole of such quarterly payment; [And if on any day before any quarterly payment of the said annuity shall have become due, then a proportional part of the said annuity, to be computed from the day of the date above written to the day of his or her death: And if on any day between any two quarterly days of payment, then a proportional part from the last quarterly day of payment to the day of his or her decease;] Then the above-written bond or obligation shall be void and of no effect.

Condition, payment of annuity,

and proportional part.

AND IT IS HEREBY DECLARED, That in case the said [*obligor*], his heirs, executors, or administrators, should at any time hereafter be desirous of re-purchasing the said annuity, and of such his or their intention should give unto the said [*obligee*], if he shall then be living, or unto the said [*wife*] his wife, if she shall have survived the said [*obligee*], seven days' notice in writing; And should, at the expiration of the

Proviso for repurchase.

II. Bond for Two Lives, Collaterally Secured, and Repurchasable on replacing Stock.

time to be mentioned in such notice, pay unto the said [*obligee*], if he shall be then living, or to the said [*wife*] his wife, if she shall then have survived the said [*obligee*], the sum of £———, together with all such sums of money as at the time of re-purchasing the said annuity shall be due for the arrears thereof; [And also together with a proportional part of the same annuity, up to and including the day of re-purchasing the same,] as and in full for the re-purchase of the said annuity; Then he the said [*obligee*], if he shall then be living, or the said [*wife*] his wife, if she shall then have survived the said [*obligee*], shall deliver the above-written bond to the said [*obligor*], his heirs, executors, or administrators, cancelled or to be cancelled; And the said annuity shall cease and determine.

III. *BOND for securing an* ANNUITY *in Consideration of* RELINQUISHING *a* BUSINESS.

Obligation.

KNOW ALL MEN, &c. (*obligation, ut ante*, p. 705).

Recital of establishing trade.

WHEREAS the above-named [*obligee*] hath for many years heretofore carried on the business of a surgeon and apothecary, and hath established a considerable practice and connection in the said business, within the liberties of London and Westminster.

Recital of agreement to resign, in consideration of annuity.

AND WHEREAS the said [*obligee*] hath agreed to resign in favour of the said [*obligor*] the said business, so established by him as aforesaid, in consideration of an annuity of £———, to be paid by the said [*obligor*], his heirs, executors, or administrators, to the said [*obligee*] and his assigns, during his life, at the times hereinafter mentioned.

Recital of assignment of business.

AND WHEREAS in pursuance of such agreement, by indenture (*c*) bearing even date with the above-written bond, and made between the said [*obligee*] of the one part, and the said [*obligor*], of the other part; the said [*obligee*] hath granted and yielded up unto the said [*obligor*] the liberty or privilege of carrying on the business of a surgeon and apothecary heretofore carried on in the liberties of London and Westminster by the said [*obligee*], in the room and as

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(*c*) See the form, *infra*, p. 711.

the successor of the said [*obligee*], and all the benefit to arise therefrom; AND has, by such indenture, entered into covenants with the said [*obligor*], for recommending and introducing the patients of the said [*obligee*] to the said [*obligor*], and for preventing the said [*obligee*] from exercising the said business within the liberties of London and Westminster, or within ten miles from the same;

III. Bond for Annuity for relinquishing Trade.

Covenant to recommend obligor,

and not to practise within certain limits.

NOW THE CONDITION of the above-written bond is such, that if the above-bounden [*obligor*], his heirs, executors, or administrators, should pay unto the said [*obligee*], or his assigns, during his life, One annuity of £———, without any deduction, by equal half-yearly payments, on &c., in every year; the first half-yearly payment thereof to be made on the ——— day of ——— next ensuing the date of the above-written bond: [AND ALSO if the said [*obligor*], his heirs, executors, or administrators, should, within twenty days next after the decease of the said [*obligee*], pay unto the executors, administrators, or assigns of the said [*obligee*] a proportional part of the said annuity, for the time which at his decease shall have elapsed of the half-yearly payment thereof then growing due,] Then the above-written bond shall be void and of no effect.

Condition for payment of annuity,

and proportional part.

IV. *BOND by several* OBLIGORS *for securing an* ANNUITY *for the* OBLIGEE'S LIFE, *in Consideration of a Conveyance and Surrender of Freehold and Copyhold Premises.*

KNOW ALL MEN by these presents, That we [*obligors*], of &c., and [*obligor*] of &c., are bound to [*obligee*], of &c., in the sum of £———, to be paid to the said [*obligee*], or to his attorney, executors, administrators, or assigns; For which payment we bind ourselves jointly and severally (*d*) by these presents. Sealed with our respective seals. Dated, &c.

Obligation from one to one.

WHEREAS the above-bounden [*obligors*] have agreed with the above-named [*obligee*], to grant to him and his assigns,

Recital of contract for purchasing an-

(*d*) See as to this, Rules of the Supreme Court, 1883, Ord. XVI., rr. 4, 6.

IV. Bond for Annuity in Consideration of an Estate.

an annuity of £———, for his life: And the consideration for the purchase of the said annuity, is a conveyance and surrender, made or to be made by the said [*obligee*] to the said [*obligors*], their heirs and assigns, as tenants in common, of certain freehold and copyhold messuages, lands, and hereditaments, of him the said [*obligee*], situate in the parish of ———, or elsewhere in the county of ———.

Annuity in consideration of conveyance and surrender of freehold and copyhold premises.

Condition for paying annuity for obligee's life.

NOW THE CONDITION of the above-written bond is such, that if the said [*obligors*], or any of them, their, or any of their heirs, executors, or administrators, should, from time to time, during the life of the said [*obligee*], pay unto the said [*obligee*], or his assigns, One annuity of £———, commencing, from the ——— day of ——— next preceding the date of the above-written bond, by equal half-yearly payments, on, &c., in every year, clear of all deductions: and should make the first payment of the said annuity on the ——— day of ——— next ensuing the date of the said bond, provided the said [*obligee*] should be then living; [And in the event of the death of the said [*obligee*], in the interval of any of the said half-yearly days of payment, and either before or after the said ——— day of ——— next, then if the said [*obligors*], or any of them, their, or any of their heirs, executors or administrators, should pay unto the executors, administrators, or assigns of the said [*obligee*], [as part of his personal estate], such part of the said annuity of £——— as shall be in proportion to the time which, inclusive of the day of the decease of the said [*obligee*], shall have elapsed prior to his decease, and after the day of payment next preceding that event, or, as the case shall require, next after the ——— day of ——— last, if the said [*obligee*] should die prior to the ——— day of ——— next: [And if the said [*obligors*], or any of them, their, or any of their heirs, executors, or administrators, should pay such proportional part of the said annuity of £———, as soon after the decease of the said [*obligee*] as demand shall be made thereof by the executors, administrators, or assigns of the said [*obligee*], and clear of all deductions,] Then the above-written bond shall be void and of no effect; or otherwise shall be and remain in full force and effect.

With proportional part to his decease.

Proportional part.

V. *DEED OF COVENANT for Payment of an* ANNUITY *collaterally secured by Bond, in Consideration of Resigning a* BUSINESS.

THIS INDENTURE, made the ——— day of ———, BETWEEN [*grantee*], of &c., surgeon and apothecary, of the one part, and [*grantor*], of &c., surgeon and apothecary, of the other part. WHEREAS the said [*grantee*] hath, for many years past, carried on the business of a surgeon and apothecary, and hath established a considerable practice and connection in the said business at ——— aforesaid. AND WHEREAS the said [*grantee*] hath agreed with the said [*grantor*] to resign in favour of the said [*grantor*] the said practice and connection in consideration of an annuity of £———, to be paid by the said [*grantor*], his heirs, executors, or administrators, to the said [*grantee*] and his assigns, during his life, at the times hereinafter mentioned. AND WHEREAS in pursuance of the said agreement, the said [*grantor*] hath, by his bond (*e*), bearing date herewith, become bound unto the said [*grantee*], in the penal sum of £———, with a condition thereunder written, making the same void if the said [*grantor*], his heirs, executors, or administrators should pay unto the said [*grantee*], or his assigns, during his life, an annuity of £——— without any deduction, by equal half-yearly payments, on &c., in each year, the first half-yearly payment thereof to be made on the ——— day of ———, next ensuing the date above written: [AND ALSO should, within twenty days next after the decease of the said [*grantee*], pay unto the said executors, administrators, or assigns of the said [*grantee*] a proportional part of the annuity for the time which at his decease should have elapsed of the half-yearly payment thereof then growing due.] NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said annuity, the said [*grantee*] doth hereby grant and resign unto the said [*grantor*], the liberty or privilege of carrying on and conducting the business of a surgeon or apothecary, heretofore practised and carried on by him the said [*grantee*],

Parties.

Recital of carrying on business;

of agreement to resign in consideration of annuity;

of collateral bond for securing annuity,

and proportional part.

Testatum.

Resignation of business.

(*e*) *Vide* the form of the bond, *ante*, p. 708.

V. Covenant for Paying Annuity for Surrendering Business.

at ———, in the stead and as the successor of the said [*grantee*], and all profits and advantage to arise from the same. And the said [*grantee*] hereby covenants with the said [*grantor*], as soon as conveniently may be, to introduce and recommend the said [*grantor*] to all the patients of the said [*grantee*], in his business or profession as aforesaid: And will use his utmost endeavours to procure the said [*grantor*] to be employed by such persons in like manner as he the said [*grantee*] hath heretofore been employed by them in his said business: And that he the said [*grantee*] will not practice or profess the business of a surgeon or apothecary, or either of them, within ———, or within ten miles from the same ———, without the licence of the said [*grantor*] first obtained in writing: And will not recommend or procure to be recommended any other person or persons whomsoever than the said [*grantor*] to any person or persons at this time employing him the said [*grantee*], in his said business: And the said [*grantor*] hereby covenants with the said [*grantee*] to pay to the said [*grantee*] or his assigns during his life the said annuity of £———, on the days in the said bond appointed for payment thereof, [together with such proportional part thereof as aforesaid, unto the executors, administrators, or assigns of the said [*grantee*].]

Covenant by grantee to introduce and recommend grantor to his employers.

Not to practise within ten miles.

Not to recommend any other person.

Covenant by grantor to pay annuity.

In witness, &c.

VI. *DEED OF COVENANT to secure an* Annuity *by way of Pension for a* Minister *of a* Chapel *on his Retirement, and further Provision for his Wife and Family.*

Parties.

THIS INDENTURE made the ——— day of ———, 18—, Between the several persons whose names and seals are written and affixed in the first column of the schedule hereunder written (and who are hereinafter referred to as the subscribers), of the first part, the Rev. A. B., minister of the

VI. Covenant for Securing Pension, &c. for Retiring Minister.

——— chapel, in the city of ———, and C. B., his wife, of the second part, and W. X., of &c., and Y. Z., of &c. (who and the survivor of them, or other the trustees or trustee for the time being of these presents, are hereinafter referred to as the trustees), of the third part: WITNESSETH that in consideration and recognition of the fifty years' services of the said A. B., as minister of the gospel at ——— aforesaid, and in prospect of his retirement from such ministry, the subscribers do grant and severally covenant with A. B. and C. B., and each of them, to pay to A. B. during the remainder of his life an annuity of 300*l.* clear of all deductions, and from and after his decease to C. B. during the remainder of her life, in case she shall survive A. B., an annuity of 200*l.* clear of all deductions; such annuities [to be considered as respectively accruing from day to day, but] to be paid half-yearly, and the first half-yearly payment of the annuity of 300*l.* to be paid at the expiration of six calendar months after his actual retirement; and the first payment of the annuity of 200*l.* (if it shall become payable), to be made at the expiration of six calendar months next after the decease of A. B.: PROVIDED ALWAYS that the subscribers shall be liable only for such annual portion of the respective annuities as is set opposite to their several names in the second and third columns respectively of the schedule hereunder written. AND THIS INDENTURE ALSO WITNESSETH that in consideration of the premises the subscribers hereby grant and severally covenant with the trustees to pay to the trustees the gross and annual sums set opposite to their respective names in the fourth column in the said schedule, and in the case of an annual sum for the period therein mentioned, such annual sums to be considered as accruing from day to day, but to be payable as in the said schedule is mentioned, and to determine on the death of A. B.: AND IT IS HEREBY AGREED that the trustees shall receive the said gross and annual sums and invest the same as and when received in such manner as they shall think fit, and shall apply the income from time to time arising from such investment, so far as the same will extend, in or towards supplementing the said annuity hereinbefore given to A. B. during his life, to the clear value of 500*l.*, and subject thereto the said trust fund and the income thereof shall be held by the trustees in trust for the four daughters of

VI. Covenant for Securing Pension, &c. for Retiring Minister.

A. B. in equal shares as present vested, and transmissible interests and shares.

In witness, &c.

The Schedule above referred to.

Names of Subscribers.	Annuity of £500.	Annuity of £200.	Gross and Annual Sums.
A. B., of &c. (Seal)	£50 per annum	£30 per annum	£100 at this date, and £200 before the end of 18—.
C. D., of &c. (Seal)	£25 ,, ,,	£20 ,, ,,	£25 per annum during the life of C. D.
E. F., of &c. (Seal)	£25 ,, ,,	£15 ,, ,,	£25 per annum payable half-yearly; first payment to be on the —— day of ——, 18—.

VII. *GRANT of a Personal* Annuity *for the Life of the Grantor, in which* Two Sureties *join; and Power to* repurchase.

Parties.

THIS INDENTURE, made &c., Between [*grantor*], of &c., [*surety*], of &c., and [*other surety*], of &c., of the one part; and [*grantee*], of &c., of the other part. Whereas the said [*grantee*] has contracted with the said [*grantor*] for the purchase of an annuity or yearly sum of £——— to be paid to the said [*grantee*], his executors, administrators, or assigns during the life of the said [*grantor*] at the price of £———.

Recital of contract for sale of annuity;

And whereas upon the treaty for the purchase of the said annuity, it was agreed that the same should be secured by these presents, and also by the bond of the said [*grantor*] and [*surety*], and [*other surety*], who had agreed to join therein as sureties for the said [*grantor*], in securing the payment of the same annuity or yearly sum.

of bond from three to one, for paying annuity.

And whereas, in pursuance of the said agreement, the said [*grantor*], [*surety*], and [*other surety*], by their bond or obligation in writing, bearing even date with these presents,

VII. Grant and Covenant, with Two Sureties, Defeasance, &c.

and any two and each of them, have and has become jointly and severally bound unto the said [*grantee*], in the sum of [*double the purchase-money*]: With a condition thereunder written for making void the same, if the said [*grantor*] and [*sureties*], or any or one of them, or the heirs, executors, or administrators of them or any or one of them, should pay unto the said [*grantee*], his executors, administrators, or assigns, during the life of him the said [*grantor*], one annuity or yearly sum of £———, clear of all deductions, by equal quarterly payments, on the ——— day of ———, &c., the first payment to be made on the ——— day of ——— next ensuing the date of the said bond or obligation: [And also if the heirs, executors, or administrators of the said [*grantor*], or the said [*sureties*], or either of them, or the heirs, executors, or administrators of them or either of them, should pay unto the said [*grantee*], his executors, administrators, or assigns, in case the said [*grantor*] should happen to depart this life on any day on which any quarterly payment of the said annuity should become due, the whole of such quarterly payment: And if on any other day, a proportional part of the said annuity up to the day of the death of the said [*grantor*].] NOW THIS INDENTURE WITNESSETH, that, in further pursuance of the said agreement, and in consideration of the sum of £———, by the said [*grantee*] paid to the said [*grantor*], upon the execution of these presents (the receipt whereof the said [*grantor*] hereby acknowledges), THEY the said [*grantor*] and [*sureties*] do, and each and every of them doth, grant unto the said [*grantee*], for the life of him the said [*grantor*], AN annuity or yearly sum of £———, [TO HOLD, receive, and take the same, henceforth, during the life of him the said [*grantor*],] to be paid unto the said [*grantee*] by four equal quarterly payments, on the ——— day of ———, &c., the first payment thereof to be made on the ——— day of ——— next, without any deduction, [Together with a proportional part of the said annuity for the time which shall elapse between the last of the said

Proportional part.

Testatum.

Grant of annuity by three to one.

Habendum (*f*).

Proportional part.

(*f*) The *habendum*, though usually inserted in a grant of a personal annuity, is a formal and not a necessary part of the deed, and may be omitted.

VII. Grant and Covenant, with Two Sureties, Defeasance, &c.

days of payment preceding the day of the decease of the said [*grantor*], to the day of such his decease,] as in the condition to the said bond is mentioned. AND THE SAID (*g*) [*grantor*] and [*sureties*], and any two of them, separately and apart from the other of them; and each of them separately and apart from the others and other of them, severally covenant with the said [*grantee*], that they the said [*grantor*] and [*sureties*], or some or one of them, or the heirs, executors, or administrators of them, or some or one of them, will pay unto the said [*grantee*], during the life of the said [*grantor*], the said annuity or yearly sum of £———, on the days and times, and in manner aforesaid. AND THE SAID [*grantee*] covenants with the said [*grantor*] and [*sureties*], and each and every of them, that in case the said [*grantor*] and [*sureties*], any or one of them, or the heirs, executors, or administrators of either of them the said [*sureties*], should be desirous of repurchasing the said annuity; and of such intention should give ——— months' notice in writing unto the said [*grantee*], his executors, administrators, or assigns, then he the said [*grantee*], his executors, administrators, or assigns, upon the expiration of the said ——— months, for which such notice shall be so given as aforesaid, on receiving full payment of the said annuity, and all arrears thereof, up to and including the day of repurchasing the same, [Together with a proportional part of the same annuity in case such repurchase should be made on any day than one of the said quarterly days of payment, for the time which shall have elapsed from the then last preceding quarterly day of payment, up to and including the day of such repurchase;] And all and every sums and sum of money, if any, which shall be then due for or on account of any expenses occasioned by the non-payment thereof, accept and take the sum of £———, in full for the repurchase of the

Joint and several covenant to pay annuity from three to one.

Power to repurchase, where there are two sureties.

Proportional part.

(*g*) If there be only one surety, the covenant may be—"AND THE SAID [*grantor*] and [*surety*] do, and each of them doth hereby, covenant with the said [*grantee*], that they the said [*grantor*] and [*surety*], or one of them, or the heirs, executors, or administrators of them or one of them, will," &c., *ut supra*.

Covenant to pay annuity from two to one jointly and severally.

VII. Grant and Covenant, with Two Sureties, Defeasance, &c.

said annuity; And the said [*grantee*], his executors, administrators, or assigns, will or shall thereupon, at the cost of the person or persons requiring the same, release, or otherwise dispose of the same annuity, and all the securities for the same, as the person or persons making such repurchase shall in that behalf direct or appoint. But if such repurchase shall be made by the said [*sureties*], or either of them, or by the heirs, executors, or administrators of them or either of them, the said annuity shall continue for the benefit of the person or persons who shall repurchase the same; and the same, and the several securities for the same, shall be assigned, or otherwise assured by the said [*grantee*], his executors, administrators, or assigns, unto the person or persons repurchasing the same, or otherwise as he, she, or they shall direct or appoint; Subject to the like right of the said [*grantor*] to repurchase the same.

If repurchase made by sureties, annuity to continue for their benefit.

In witness, &c.

VIII. *GRANT of* Additional Annuity *for the Lives of* Two Nominees, *by Supplemental Deed; charged on a* Leasehold *Estate by the Principal Deed assigned to Trustees; with additional Power of Distress; Covenants for* Insurance *against* Fire; *Power to Repurchase, &c.*

THIS INDENTURE, made &c., Between the [*grantor*], of &c., of the one part, and [*grantee*], of &c., of the other part, and supplemental (*h*) to an indenture dated, &c. Whereas the said [*grantee*] has agreed with the said [*grantor*] for the purchase of an annuity or yearly sum of £———, payable during the lives of [*nominees*] named in the principal indenture, and during the life of the longest liver of them,

Parties.

Recital of contract for purchasing additional annuity;

(*h*) As to supplemental deeds, see *post*, p. 778.

VIII. Grant of Additional Annuity by Indorsement.

at the price of £———. And whereas upon the treaty for the purchase of the said annuity it was agreed that the same should be charged upon the pieces or parcels of ground, messuages and lands (*i*) described in the principal indenture. NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £———, paid by the said [*grantee*] to the said [*grantor*], on the ——— day of ——— now last past (the receipt whereof the said [*grantor*] hereby acknowledges); He the said [*grantor*] by these presents grants to the said [*grantee*] an annuity or yearly sum of £———, to be paid during the lives of the said [*nominees*], and during the life of the longest liver of them; and to be charged upon the pieces or parcels of ground, messuages, or tenements, and premises, described in the principal indenture; and to be paid to the said [*grantee*], his executors, administrators, and assigns, by two equal half-yearly payments in the year, on the ——— day of ———, and the ——— day of ———, in each and every year, the first payment to be made on the ——— day of ——— next; [Together with a proportional part of the said annuity, up to and including the day of the death of the longest liver of them the said [*nominees*]; such proportional part to be paid and payable immediately after the decease of such longest liver.] To hold, receive, and take the said annuity of £———, and every part thereof, unto the said [*grantee*], for and during the lives of the said [*nominees*], and during the life of the longest liver of them, free from all deductions. And the said [*grantor*] covenants with the said [*grantee*], to pay to him during the lives of the said [*nominees*], and during the life of the longest liver of them, the said annuity of £———, on the days or times hereby appointed for payment thereof, without any deduction. And it is hereby declared and

to be charged on premises charged with original annuity;

and further secured by judgment on original warrant of attorney.

Testatum.

Consideration previously paid.

Grant of additional annuity;

charged on premises within-mentioned;

and payable half-yearly.

Habendum.

Covenant to pay annuity.

The word *hereditament* whether properly applied to a chattel interest.

(*i*) The property being leasehold, the word *hereditaments* is not technically applicable; because the word *hereditament*, in the most strict and proper sense, is applied only when the estate therein is of freehold or inheritance, and which not being devised descends to the *heir:* Noy's Tenures, 54, 6th ed. 356; Cowel's Interpreter, tit. Hereditaments. *Sed vide contrà*, Prest. Shepp. Touchst. 74. The word *hereditaments*, however, is very usually applied to leasehold parcels, as denoting the nature of the property, and not the estate in it.

AGREED, that the trustees and trustee for the time being acting in the trusts of the principal indenture, shall stand and be possessed of the pieces or parcels of ground, messuages, and premises within mentioned and described, with their and every of their appurtenances, as well for the purpose of securing the payment of the annuity or yearly sum of £——— hereby granted, as for securing the payment of the annuity or yearly sum of £——— mentioned in the principal indenture. AND IT IS ALSO AGREED, that for the purpose of securing the payment of the annuity hereby granted, the trustees and trustee for the time being acting in the trusts of the principal indenture, shall in all respects have such and the same powers and authorities as are given to them by the same indenture, for the purpose of securing the therein-mentioned annuity. AND THE SAID [*grantor*], hereby covenants with the said [*grantee*], that in case any sale should be made of the pieces or parcels of ground, messuages and premises therein mentioned, or of any part thereof, for the purpose of providing for the payment of the annuity hereby granted, then, and in such case, he the said [*grantor*], his executors, administrators or assigns, will, if requested, join and concur in the making thereof, and in executing the assignments and assurances of the premises which may be so sold to the purchaser or purchasers thereof, and do all other reasonable acts for confirming such sale or sales, and further assurance of the premises sold. AND THE SAID [*grantor*] hereby further covenants with the said [*grantee*], that, so long as the annuity hereby granted shall remain payable, he the said [*grantor*], his heirs, executors, or administrators will insure, and keep insured, in the name or names of the said [*grantee*], his executors, administrators, or assigns (*k*), the messuages or tenements, and buildings described in the principal indenture, in the sum of £——— over and above the sum of £———, in which the same premises are therein agreed to be insured as therein is mentioned: AND will pay all sums which may from time to time become payable for keeping on foot such additional insurance

VIII. Grant of Additional Annuity by Indorsement.

Trustees to hold premises upon trust to secure additional annuity;

and to have same powers for securing additional annuity as for securing original annuity.

Covenant by grantor to join in conveyance to purchasers, and enter into usual covenants with them.

Covenant to insure buildings from fire in an additional sum;

and to assign policies to grantee.

(*k*) To prevent the trouble and expense of assigning the policy of insurance, it seems to be advisable for the grantor to covenant to effect the insurance in the name of the grantee, his executors, administrators, and assigns, as in the text.

Insurance in grantee's name.

VIII. Grant of Additional Annuity by Indorsement.

within ——— days after the date when the same shall become payable respectively, and will from time to time, on demand, produce to the said [*grantee*], the policy or policies of insurance for the time being subsisting, and deliver to him the receipts for the premiums, or other sums payable in respect of such policy or policies: PROVIDED ALWAYS, that if the said [*grantor*], should, at any time during the continuance of the annuity hereby granted, refuse or neglect to insure the said sum of £——— (over and above the said sum of £———, so long as the annuity mentioned in the principal indenture continues payable), then and so often it shall be lawful for the said [*grantee*], in like manner to insure the said sum of £———, or any less sum (over and above the said sum of £———, so long as the annuity mentioned in the principal indenture shall continue payable), and for such length of time as he or they shall think proper: AND IT IS HEREBY DECLARED AND AGREED, that all sums of money which shall be recoverable on any such policy of insurance as aforesaid shall forthwith be laid out and expended in rebuilding or repairing the premises insured, or such of them as may be destroyed or injured by fire. AND THE SAID [*grantor*], covenants with the said [*grantee*], upon demand to pay and satisfy unto the said [*grantee*], the premiums, costs, and charges, which he the said [*grantee*], shall expend in or about the effecting of any such insurance as aforesaid, or in or about the receiving or recovering of the money thereby recoverable. AND IT IS HEREBY DECLARED AND AGREED, that in case the said [*grantor*], should make default in payment of such last-mentioned costs, charges, and expenses, by the space of fourteen days next after any such demand shall be made as aforesaid, then and in every such case the same, with interest thereupon after the rate of 5*l.* per centum per annum, from the respective times at which the said [*grantee*], shall pay or expend the same, shall be levied and raised, either by distress or in such other way as is hereinbefore mentioned or referred to, with respect to the arrears of the annuity hereby granted. PROVIDED ALWAYS, that in case the said [*grantor*], his heirs, executors, or administrators, should at any time hereafter be desirous of repurchasing the annuity hereby granted, and of such his or their intention should give unto the said [*grantee*], his executors, administrators, or assigns, notice in writing, by the space of six

If grantor neglect, grantee may insure.

Moneys to be received under policies to be expended in rebuilding premises.

Covenant by grantor to repay sums paid by grantee for insurance.

Power to grantor to recover sums paid for insurance by distress, &c.

Power to repurchase.

VIII. Grant of Additional Annuity.

calendar months, or leave the same at his or their usual place or places of abode, then and in such case the said [*grantee*], his executors, administrators, or assigns, will or shall, at the expiration of the said period of six calendar months, on receiving all sums of money which shall be due for arrears of the said annuity, [together with a proportional part of the same annuity, from the last day of payment next preceding such repurchase up to and including the day of repurchasing the same,] accept and take the sum of £——— in full for the repurchase of the annuity hereby granted: And on receipt of the said sum of £———, and all arrears of the said annuity, [and such proportional part thereof as aforesaid,] the annuity hereby granted, and every part thereof, and all powers and authorities herein contained for enforcing the payment thereof, shall cease, determine, and be absolutely void, anything herein contained to the contrary thereof notwithstanding.

In witness, &c.

IX. *GRANT of an* Annuity *for the Grantee's Life, and* Demise *of* Freeholds *and* Covenant *to* surrender Copyholds *to Trustees; with Trusts for Sale, Mortgage, &c. and further secured by* Bond. *The* Consideration *being a* Conveyance *and Surrender of the Fee of the same Estates.*

Testatum, in consideration of conveyance of freehold lands to grantor in fee; and covenant to surrender copyhold lands to grantor in fee.

THIS INDENTURE, made &c., Between [*grantor*], of &c., of the first part, [*grantee*], of &c., of the second part; and [*trustee*], of &c., of the third part. WITNESSETH, that in consideration that the freehold lands and hereditaments, hereinafter demised, have by an indenture bearing date the ——— day of ———, and made between the said [*grantee*], of the first part, and the said [*grantor*], of the second part, been conveyed unto and to the use of the said [*grantor*], his heirs, and assigns; and that the copyhold messuages, lands, and hereditaments, hereinafter covenanted to be surrendered, have been, or forthwith are to be, surrendered by the said [*grantee*], unto or to the use of the said

IX. Grant, Demise of Freeholds, and Covenant to Surrender Copyholds, Trusts for Sale, &c.

[*grantor*], his heirs and assigns; and that such conveyance has been made, and the said surrender has been, or is to be, subject to an agreement, that an annuity of £———, should be secured by the said [*grantor*] to the said [*grantee*], for his life, and should be charged on the said messuages, lands, and hereditaments, as is hereinafter mentioned, in addition to a bond of the said [*grantor*], which he has entered into, to the said [*grantee*], for securing the same annuity (*a*); The said [*grantor*], as beneficial owner, hereby conveys and grants to the said [*grantee*] an annual sum by way of rent-charge of £———, to commence from the ——— day of ——— now last past; and to be charged upon, All and singular the freehold lands and hereditaments hereinafter demised, with their rights, members, and appurtenances; To HOLD, receive, and take the said annuity or rent-charge of £———, unto the said [*grantee*], during his life, to be paid to the said [*grantee*], by equal half-yearly payments, on &c., in every year, without any deduction; the first half-yearly payment to be made on the ——— day of ——— next; [and a proportional part of the said annuity to be paid up to the time of the decease of the said [*grantee*], in case he should die on any other day than one of the said days of payment; and in case he should die before the ——— day of ——— next, then the said proportion to be computed from the ——— day of ——— last past]. AND the said [*grantor*] hereby covenants with the said [*grantee*] to pay to the said [*grantee*] the said annuity or rent-charge of £——— without any deduction, as and when the same shall become payable, [and also such proportional part thereof as aforesaid]. AND THIS INDENTURE ALSO WITNESSETH, that for further securing the said annuity or rent-charge, and in consideration of the premises, the said [*grantor*], by the direction of the said [*grantee*], hereby as beneficial owner conveys and demises unto the said [*trustee*], ALL THOSE, &c. [*freehold parcels*]; All which freehold lands and hereditaments, together with the copyhold messuage, lands, and hereditaments, hereinafter covenanted to be surrendered, are now better known by the description contained in the schedule to these presents; To HOLD the said freehold premises, unto the said [*trustee*], from

Reference to bond (*a*).

Nominal consideration to grantor.

Grant of annuity,

charged upon lands hereinafter demised.

Habendum to grantee and his assigns for his life;

without any deduction;

with proportional part to his decease.

Covenant to pay annuity.

Further testatum.

By direction of grantee, demise to trustee of freehold parcels.

Reference to modern description in schedule.

(*a*) See for form of bond, *ante*, p. 705.

IX. Grant, Demise of Freeholds, and Covenant to Surrender Copyholds, Trusts for Sale, &c.

the day next before the day of the date of these presents, for the term of 1,000 years thence next ensuing, without impeachment of waste (*b*): Upon trust that if and whenever the said annuity or rent-charge, or any half-yearly payment thereof, shall be in arrear in the whole or in part by the space of forty days next after the time hereinbefore appointed for payment thereof; the said [*trustee*], his executors, administrators, or assigns, shall, by and out of the rents and profits of the hereditaments comprised in the said term of 1,000 years; or by mortgage or sale thereof, or of a competent part thereof, for all or any part of the said term, or by any other reasonable means, levy and raise such arrears of the said annuity, or rent-charge, as from time to time shall become due and remain unpaid; together with all such damages, costs, charges, and expenses as the said [*grantee*], or his assigns, shall incur, by reason of the non-payment of the said annuity or rent-charge, or any part thereof; together with the costs, charges, and expenses attending the execution of the trusts of the said term of 1,000 years. And upon further trust, that in the meantime, and until the said annuity or rent-charge, or some half-yearly payment thereof, shall be in arrear or unpaid, as aforesaid: and also when and as often as all the arrears of the said annuity or rent-charge, and the said costs, charges, damages, and expenses shall be raised, or fully satisfied and paid, the said [*trustee*], his executors and administrators, shall permit and suffer the said [*grantor*] or other the person or persons who for the time being shall be entitled to the reversion or remainder of the hereditaments comprised in the said term of 1,000 years, expectant on the determination of the same term, to receive the rents and profits of the same premises for his and their own benefit:

Habendum to trustees for 1,000 years, upon trust for securing annuity.

And upon trust, if annuity should be in arrear forty days, out of the rents, or by mortgage, &c. to raise arrears and all costs, &c.

Until annuity is in arrear forty days;

when all arrears and costs shall be satisfied, trustee to permit grantor to take the rents, &c.;

(*b*) Where an estate "and all woods" upon it are demised for a term (without express words making the termor dispunishable of waste), upon trust, by different specified ways and means, including "felling timber," to raise and pay an annuity when in arrear, *quære*, whether this gives the annuitant any interest in the timber, or operates as a mere personal agreement. See *Davis* v. *The Duke of Marlborough*, 2 Wils. Ch. R. at p. 147; *Fairfield* v. *Weston*, 2 Sim. & St. 96. Timber.

In this precedent the term is created by the deed of grant, but this is not now generally *necessary*, as a term may be created at any time, if occasion requires, by supplemental deed, *ante*, p. 674. Term.

IX. Grant, Demise of Freeholds, and Covenant to Surrender Copyholds, Trusts for Sale, &c.

And upon further trust, that he the said [*trustee*], his executors and administrators, shall from time to time, after paying the said annuity or rent-charge, when and as the same shall become due; and also, after deducting such costs, charges, damages, and expenses as aforesaid, pay to the said [*grantor*] or other person or persons for the time being entitled in reversion as aforesaid, or to whom he or they shall appoint, the money (if any) which from time to time shall remain in the hands of the said [*trustee*], his executors or administrators. Provided always, that after the decease of the said [*grantee*], and payment to him and to his executors, administrators, or assigns, of the said annuity or rent-charge, and all the arrears thereof; [and also of such proportionate part as aforesaid;] and also, after payment of all such costs, charges, damages, and expenses as aforesaid; and also, after full performance or discharge of the trusts of the said term of 1,000 years; then the same term, or so much thereof as shall not be disposed of under the trusts hereby declared concerning the same, shall cease and determine: but without prejudice to any sale, mortgage, or disposition previously made of all or any part of the said premises, in pursuance of any of the trusts hereinbefore declared concerning the said term. And the said [*grantor*] as beneficial owner, hereby covenants with the said [*grantee*], that he the said [*grantor*], or his heirs, will forthwith, at his and their own costs, surrender into the hands of the lord or lords, lady or ladies of the said manor of ———, according to the custom of the same manor; To the use of the said [*trustee*], his heirs and assigns; subject nevertheless to a Condition to avoid the same surrender, on the due and regular payment of the said annuity or rent-charge of £———, [and the said proportional part thereof,] All that, &c. [*copyhold parcels*]. Which copyhold messuage, lands, and hereditaments, together with the freehold lands and hereditaments hereinbefore described, are now better known by the names and other descriptions contained in the schedule to these presents; To the intent that the said [*trustee*], or his heirs, when admitted tenants or tenant of the said copyhold messuage, lands, and hereditaments, may be so admitted, To hold the same to them or him, their or his heirs and assigns, at the will of the said lord or lords, lady or ladies of the said manor, by copy of court-roll, according to the custom of the said manor; And

and upon trust to pay surplus moneys to grantor.

Proviso for cesser of term.

Covenant by grantor to surrender copyhold lands;

to the use of the trustee in fee;

subject to condition to avoid same on due payment of annuity.

Copyhold parcels.

Reference to modern description in schedule.

To the intent that trustee may be admitted;

Habendum in fee;

at the will of the lord;

by and under the rents, suits, and services therefor due and of right accustomed to be paid and performed. And the said [*trustee*], and his heirs, when admitted tenant or tenants of the said copyhold messuage, lands, and hereditaments, shall hold the same, Upon, under, and subject to the same, or the like trusts, provisions, declarations, and agreements, as are hereinbefore declared or contained of and concerning the said term of 1,000 years, or as near thereto as the nature of the estate of the said [*trustee*] will admit. But the said [*grantor*] hereby declares, that as between his real and personal representatives, his personal estate shall be the primary fund, the rents of the said freehold lands and hereditaments the secondary fund, and the rents of the said copyhold messuage, lands, and hereditaments the third or ultimate fund, for securing and satisfying the said annuity or rent-charge; And the said [*grantor*] hereby covenants with the said [*grantee*] to pay unto the said [*grantee*] the said annuity of £——— [and also such proportional part thereof as aforesaid] free and clear of and from all taxes, charges, rates and other deductions whatsoever, at the days and times, and in manner and form hereinbefore appointed for the payment thereof. In witness, &c.

under the rents, &c.

Upon trusts, &c. by reference to those declared of freeholds.

Declaration by grantor, that his personal estate shall be the primary fund, the rents of the freeholds the secondary fund, and the rents of the copyholds the ultimate fund for satisfying annuity.

Covenant for paying annuity for grantee's life.

The Schedule above referred to.

X. *RELEASE of an* Annuity *on a* Repurchase, *and* Assignment *of the* Term *to* merge; *where the Repurchase-money is paid at the Time, or has been previously paid.* (*By supplemental deed*).

THIS INDENTURE, made &c., Between [*grantee*], of &c. (*d*), of the first part, [*trustees*], of &c., of the second part,

Parties.

(*d*) If a married woman be entitled (otherwise than to her separate use) to an annuity, by way of rent-charge, granted out of a *freehold* interest, either in fee or in tail, or for her own life, or for the life of another person, she should be a party to the release with her husband, the deed of course being duly acknowledged. But if the rent-charge be a chattel interest, as for years

As to release or conveyance of annuities of married women.

X. Release and Reconveyance on Repurchase, &c.

and [*grantor*], of &c., of the third part (*e*); and supplemental to an indenture dated, &c., and expressed to be made between [*parties*] for securing to the said [*grantee*] an annuity of £——— by a charge thereof upon the messuages, lands and hereditaments particularly described in the said indenture, and by a demise of the same premises to the said [*trustees*] for a term of ninety-nine years as therein is mentioned: AND WHEREAS (*f*) the said [*grantor*] has contracted with the said [*grantee*] for the repurchase of the said annuity, £———, at or for the price of £———. AND WHEREAS all arrears of the said annuity of £——— have been paid and discharged by the said [*grantor*], up to and including the day of the date of these presents, as the said [*grantee*] hereby admits and acknowledges. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said contract, and in consideration of the sum of £———,

Recital of contract for repurchase.

Recital that all arrears have been paid.

First testatum.

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determinable on a life, or lives, the husband alone may convey or release it, as he might release his wife's annuity granted for a life or lives, out of a *chattel real*, whether limited to her heirs, or to her executors. *Vide Butt's case*, 7 Co. 25, a. So, if a personal annuity for life or lives be limited to a married woman, her executors, &c. *Aliter*, if it were limited to her and her heirs.

Bond and judgment should be vacated.

(*e*) The bond should be cancelled and delivered to the grantor, and the grantee should execute a warrant of attorney to acknowledge satisfaction on the judgment, and sign a satisfaction to be entered in the Office (*vide ante*, p. 269).

PREVIOUS REPURCHASE.

(*f*) If the annuity has been previously repurchased without taking a release, &c. at the time, say,

Recital of previous repurchase.

"AND WHEREAS the said [*grantor*], by virtue of the power contained in the principal indenture, repurchased the said annuity on the ——— day of ——— last past, and then paid unto the said [*grantee*] all arrears thereof, and also the sum of [*consideration-money*], in full for the absolute repurchase of the same; as [*grantee*] hereby acknowledges; And thereupon the said indenture was delivered up to the said [*grantor*]; but no actual release or surrender of the said annuity, or of the hereditaments and premises comprised in the said term of ninety-nine years, has been made or executed by the said [*grantee*] and [*trustees*] respectively. NOW THIS INDENTURE WITNESSETH, that, for the considerations aforesaid, he the said [*grantee*] hereby grants," &c.

Testatum, where there has been a previous repurchase.

X. Release and Reconveyance on Repurchase, &c.

to the said [*grantee*] paid by the said [*grantor*], upon the execution of these presents (the receipt whereof the said [*grantee*] hereby acknowledges); He the said [*grantee*] (*h*) hereby releases unto the said [*grantor*], his heirs, executors, administrators and assigns, ALL THAT the said annuity of £———, so granted and secured to the said [*grantee*], his executors, administrators, and assigns, for and during the life of the said [*grantor*], in and by the said indenture as aforesaid: And all arrears and future payments thereof, with all powers of distress and entry, and all other remedies whatsoever for recovering the same: To the intent that the same annuity may be merged and extinguished in or consolidated with the freehold of the said hereditaments and premises: AND THE SAID [*grantee*] hereby covenants with the said [*grantor*], that he the said [*grantee*] has not done, or know-

Grant and release of annuity to grantor tenant for life.

All arrears and powers.

To the intent that the annuity may merge.

Covenant by grantee of annuity that he has not incumbered.

(*h*) There is another mode of releasing an annuity, besides that here pursued, viz., to release the land, and the grantor in respect of it, from the payment of the annuity. But this mode is sometimes objected to, as it may extend to release other interests, which the annuitant may possibly have in the property. The above form is free from this objection.

Other modes are sometimes adopted.

The other form above referred to:

"He the said [*grantee*] hereby releases ALL and singular the messuages, lands, and hereditaments comprised in the said principal indenture, and thereby charged with the payment of the said annuity of £———, free and discharged from the same annuity, and from all arrears and payments in respect thereof, and from all powers and remedies for the recovery of the same; and also releases the said [*grantor*], his heirs, executors, and administrators, and every of them, from the covenant in the same indenture contained and entered into by the said [*grantor*] for payment of the said annuity, and from all other securities for the same, and from all actions, accounts, claims, and demands whatsoever, for or in respect of the said annuity, or the arrears thereof, or of any part thereof respectively, or of any matter or thing whatsoever relating thereto. AND THE SAID," &c. [*covenant by grantee that he has not incumbered*].

Release of the lands and grantor from payment of annuity.

No statutory covenant is implied in a conveyance by a grantee of an annuity that he has not incumbered.

X. Release and Reconveyance on Repurchase, &c.

ingly permitted or been party or privy to any act, deed, matter, or thing whatsoever whereby the said annuity or any part thereof is, or may be impeached, charged, or incumbered, or in any way affected; or whereby he the said [*grantee*] cannot or ought not to grant and release the said annuity unto the said [*grantor*] in manner aforesaid. AND THIS INDENTURE FURTHER WITNESSETH, that for the considerations aforesaid the said [*trustees*], at the request and by the direction of the said [*grantee*], testified by his execution of these presents, do, and each of them doth hereby as trustees, convey (*k*), surrender, and release, unto the said [*grantor*], ALL THOSE the messuages, lands, hereditaments and premises comprised in the said term of ninety-nine years, with the appurtenances: To the intent that the said term of ninety-nine years may be merged in or consolidated with the reversion or freehold of the same hereditaments and premises therein comprised.

Second testatum.

Surrender of term by one trustee, or by two or more.

Parcels.

All the estate, &c.

IN WITNESS, &c.

REASSIGNMENT OF LEASEHOLD.

(*k*) If the premises be leasehold, and were assigned to the trustees for the whole term, say,

Habendum of leaseholds for remainder of term, freed from annuity.

"unto the said [*grantor*], ALL THOSE, &c., TO HOLD the same premises, with their appurtenances, unto the said [*grantor*], henceforth, for and during all the residue and remainder now to come and unexpired of the said term of ——— years; Freed and absolutely discharged of and from the trusts and purposes declared thereof in and by the said indenture of the ——— day of ———; and of and from all claims and demands in respect thereof."

RECONVEYANCE OFFICE.

If the fee is in the trustees, they should reconvey to the grantor, at the request, &c., of the grantee; *Habendum*,

Habendum of freeholds, freed from annuity.

"TO THE USE of the said [*grantor*], his heirs and assigns; Freed and absolutely discharged," &c.

XI. *ASSIGNMENT, by Indorsement, of an* ANNUITY, *secured by the* COVENANT *and* BOND *of the Grantor; subject to Repurchase.*

THIS INDENTURE, made the ——— day of ———, &c., BETWEEN the within-named [*grantee*], of the one part, and [*purchaser*], of &c., of the other part (*l*). WHEREAS the said [*purchaser*] has agreed with the said [*grantee*] for the purchase of the within-mentioned annuity or yearly sum of £———, at the price of £———. AND WHEREAS a judgment was on or about the ——— day of ——— entered up on the within-mentioned warrant of attorney in the Queen's Bench Division of her Majesty's High Court of Justice. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £——— paid by the said [*purchaser*] to the said [*grantee*], the receipt whereof the said [*grantee*] hereby acknowledges, the said [*grantee*] hereby, as beneficial owner, assigns, and conveys unto the said [*purchaser*], THE within-mentioned annuity or yearly sum of £———; AND all powers and remedies for recovering and enforcing the payment thereof; AND also the judgment so entered up as aforesaid upon the within-mentioned warrant of attorney; and all benefit and advantage of the said judgment; And all sums of money to be secured or obtained by virtue thereof; TO HOLD and enjoy the said annuity or yearly sum of £——— unto the said [*purchaser*], from the ——— day of ——— now last past, for and during the life of the within-mentioned [*grantor or nominee*]; But subject to such power of re-purchase as is given or reserved to the said [*grantor*] by the within-written indenture: AND TO hold the judgment so entered up upon the said warrant of attorney, and all benefit and advantage thereof, unto the said

Parties.

Recital of contract for purchase.

Recital of entering up judgment.

Testatum.

Assignment of annuity, and all powers, &c., and judgment, and all sums, &c.

Habendum of annuity.

Subject to repurchase.

Habendum of judgment.

(*l*) It is well, where practicable, to make the original grantor a party to the assignment of an annuity; otherwise it should be ascertained that there has been no previous assignment, and that the amount of the annuity has not been reduced by a repurchase of a part. This information may be generally obtained by application to the grantor. If the grantor be not a party to the assignment, he should have an immediate notice of it, which should be in writing: this would prevent his pleading want of notice as an excuse for payment of the annuity to the assignor or a subsequent assignee.

Grantor should be a party to assignment, or have notice of it.

XI. Assignment of Annuity, Covenant, and Bond.

[*purchaser*], for his own absolute use and benefit: And the said [*grantee*] hereby nominates and appoints the said [*purchaser*], his executors, administrators, and assigns, the lawful attorney and attornies of him the said [*grantee*] for him the said [*grantee*], and in his name or in the name or names of his executors or administrators, or any of them, to sue and prosecute any action or proceeding upon the said judgment; And to give releases or discharges for the same: And further agrees to confirm, and ratify all legal acts, matters, and things whatsoever to be done and accomplished by the said [*purchaser*], his executors, administrators, or assigns in or about the said judgment and premises.

Power of attorney to sue, &c. on judgment.

In witness, &c.

APPOINTMENT.

PRELIMINARY DISSERTATION.

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A NOTICE of a few of the most important points that occur upon this extensive subject, is all that can be attempted here. For fuller information upon every branch of the subject, reference may be made to the Treatises of Lord St. Leonards (*a*), Mr. Chance, and Mr. Farwell. The present dissertation deals mainly with the questions respecting the execution of powers. Some questions that are passed over here will find a more appropriate place under the titles SETTLEMENT or WILL. As to leases under powers, *vide infra*, tit. LEASES. A discussion as to the creation and extinguishment, suspension and release of powers will be found, *infra*, tit. MORTGAGES.

WHO MAY EXECUTE POWERS.

Who may Execute Powers.]—All persons capable of disposing of real or personal property vested in them are also capable of exercising powers over such property: Sugd. Pow. 153. An appointment made by virtue of a power at common law, or by way of use, of itself vests the property in the appointee without the necessity for any other conveyance, by way of deed, attornment or otherwise: Bro. Ab. *Devise*,

(*a*) The 8th edition (1861) of this work is throughout referred to.

Execution of Powers.

pl. 12; Co. Litt. 113 a. An appointee is said to be *in* under the instrument creating the power, that is to say, he derives his title, strictly speaking, not through the donee, but through the grantor of the power. See Chance, Pow., Vol. II., Ch. 12, and the cases there cited.

APPOINTMENT BY A WIFE. What power may be executed by a wife.

Appointments by Married Women.]—A wife may, without her husband's concurrence, execute a *naked authority*, whether given before or after coverture, and though no special words are used to dispense with the disability of coverture (*b*): Harg. Co. Litt. 112 a. note (*b*); *Bayley* v. *Warburton*, 2 Com. 494; *Burnet* v. *Mann*, 1 Ves. sen. 157; *Doe* d. *Blomfield* v. *Eyre*, 5 C. B. 713. The rule is the same where both an *interest* and an authority pass to the wife, whether the authority is simply *collateral* to, or coupled with an interest in land.

A power may be exercised by a married woman, so as to take effect out of her own estate, without the concurrence of her husband, and whether the appointment operates by way of executory devise, by way of use under the statute, or as a nomination of the person to be admitted to a copyhold estate: *Harris* v. *Graham*, 1 Roll. Ab. 329, pl. 12; 1 Co. Litt. 112 a; *Gibbons* v. *Moulton*, Finch, 346; *Tomlinson* v. *Dighton*, 1 P. Wms. 149; *Lady Travell's case*, cited 3 Atk. 711; *Peacock* v. *Monk*, 2 Ves. sen. 191; 3 Vin. Abr. 427, pl. 8, 158; *Burnett* v. *Mann*, 1 Ves. sen. 156; *Driver* d. *Berry* v. *Thompson*, 4 Taunt. 294; *Downes* v. *Timperon*, 4 Russ. 334; *Curteis* v. *Kenrick*, 3 Mee. & W. 461; 9 Sim. 443.

Power while sole.

If however a power be given to a woman, to be executed by her "being sole," it cannot be executed by her during coverture: *Marquis of Antrim* v. *Duke of Buckingham*, 1 Ch. Ca. 17. See also *Horseman* v. *Abbey*, 1 J. & W. 381; *Morris* v. *Howes*, 4 Ha. 599; *Burnham* v. *Bennett*, 2 Coll. 260.

(*b*) Married women having been capable of exercising these powers before the passing of 3 & 4 Will. 4, c. 74, it appears clear that in the case of such exercise, acknowledgment under that Act is unnecessary. See sect. 78 of that Act, and Sugd. Pow. 153.

As to a married woman's powers of disposition generally, see *ante*, p. 208 *et seq.*

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Power to be exercised during coverture.

Where, by a marriage settlement, a term was limited in trust on the death of the survivor of the intended husband and wife, to raise a sum of money, and pay the same to such persons as the intended wife, at any time or times thereafter during her coverture, and notwithstanding the same, by any deed or writing should appoint, it was held that the power could not be exercised by the wife, after the death of the husband contemplated by the settlement: *Horseman* v. *Abbey*, 1 Jac. & W. 381. See also *Morris* v. *Howes*, 4 Ha. 599; *Holliday* v. *Overton*, 14 Beav. 467. So where a power of appointment by will was given to a married woman *if she should die* in her husband's lifetime: *Willock* v. *Noble*, L. R., 7 H. L. 580. In *Gould* v. *Gould*, 2 Jur., N. S. 484, it was held that the limitations over in default of appointment raised an implication that the power was not to be exercised during coverture. But that decision was disapproved of by Lord *St. Leonards*, (see Sugd. Pow. 155), and was not followed in the case of *Wood* v. *Wood*, L. R., 10 Eq. 220.

A wife may convey lands in performance of a condition.

As a *feme coverte* may, without her husband, convey lands in execution of a mere power or authority, so may she with equal effect in performance of a *condition*, where land is vested in her on condition to convey to others: W. Jones, 137, 138.

Conveyance of estate vested in wife as trustee.

Yet if a legal estate of freehold be vested in a married woman, in trust for another, the better opinion, sanctioned by uniform practice, is, that no effectual conveyance can be made, unless she and her husband join in an acknowledged conveyance of the estate: 1 Pres. Abs. 337; Lewin's Trusts, p. 33 (*c*). A reason for this distinction may be drawn from the consideration, that if a married woman were allowed to convey a trust estate, without her husband's concurrence, she might convey it before the several objects of the trusts were satisfied, for which he might jointly with her be responsible to the *cestui que trust:* a reason which does not apply to the mere execution of a power, or performance of a condition: 1 Fonb. Eq. 92, n., 5th edit.

(*c*) As to the effect of the Married Women's Property Act, 1882, *vide ante*, pp. 230, 232.

Execution of Powers.

A married woman may exercise a power over personalty, whether in possession or reversion, and in the case of appointments by married women of their reversionary interests, such powers are not interfered with by Malins' Act (20 & 21 Vict. c. 57). See sect. 3 of this statute set out sub. tit. ACKNOWLEDGMENTS, *ante*, p. 250.

Appointment by infant.

Infant.]—An infant may execute a power either at common law or by way of use, if it is not coupled with an interest: *Grange* v. *Tiving*, Orl. Bridg. 107; *Hearle* v. *Greenbank*, 3 Atk. at p. 710; *Colton* v. *Hoskins*, 16 Vin. Abr. 486, pl. 3, n.; Sugd. Pow. 177; Simpson on Infants, p. 40. In *Re Angibau*, *Andrews* v. *Andrews* (C. A.), 15 Ch. D. 228, a married infant had a life estate in personal property followed in default of issue by a general power of appointment, and in default of appointment the property was given to herself absolutely. *James* and *Brett*, LL.J., held (affirming *Jessel*, M. R.), that the power was a pure mandate, and did not deal with any property or interest of the infant, and could, therefore, be exercised during infancy. But in the case of realty it would be otherwise: Ibid. pp. 244, 246.

By 1 Vict. c. 26, an infant has no longer any power to dispose of property by will, but this statute does not invalidate the exercise by an infant of a power by deed: Ibid. at p. 244. And it seems that a power given by express words or necessary implication, to be exercised during infancy, will be good, notwithstanding it is coupled with an interest in the infant. See 1 Prest. Abst. 326; Orl. Bridg. 107; 3 Atk. 714; *Re Cardross's Settlement*, 7 Ch. D. 728. Per *Jessel*, M. R. As to leases of the lands of infants, see *infra*, tit. LEASES.

EXECUTION OF POWERS.

Mode of framing appointments.

Execution of Powers.]—In every well-drawn deed of appointment, these three points should be embraced:—1st, the deed executing the power should be expressed to be in exercise of it; 2ndly, of every other authority enabling the donee in that behalf; and 3rdly, it should be shown in the body of the deed, that the formalities required to the exe-

cution of the power are complied with. The first clearly evinces the intention of the person executing the power, which is particularly necessary where he has an interest as well as a power (*c*); the second guards against any misrecital of the deed creating the power, and in some cases has reached powers understood to have been extinguished; and the third affords internal evidence of the ceremonies having been complied with; and moreover, the attestation indorsed on a deed or other instrument, executing a power, should always state precisely that the formalities were attended to: Sug. Pow. p. 192.

Execution of Powers.

Attestation.]—To the validity of an appointment at law (and, with some exceptions, in equity), it is requisite that the terms of the authority, however trivial or impertinent in themselves, should be strictly pursued, unless the power being exercised by will, comes within the operation of the Wills Act (*d*), or being exercised by deed after 13th August, 1859, comes within the operation of 22 & 23 Vict. c. 35, s. 12, *infra*, p. 740. Thus, in a leading case, where a power was given to T. H., to be executed by any deed or instrument in writing, attested by three witnesses, and *inrolled* with the *consent* in writing of certain trustees, Lord *Ellenborough*, C. J., said: "The terms required that the revocation should be

ATTESTATION.

Power must be strictly followed.

Hawkins v. *Kemp.*

A trustee whose consent is requisite to

(*d*) As to appointments by will, see Wills Act (1 Vict. c. 26), s. 27, whereby a general gift by will of real or personal estate operates as an execution of a general power of appointment, unless a contrary intention appears by the will. See *Re Wilkinson*, L. R., 4 Ch. 587. And in numerous cases it has been held that a limited power of appointment was well exercised by a gift by a will making no reference to the power, where the circumstances sufficiently showed that such was the intention of the testator. See *Elliott* v. *Elliott*, 15 Sim. 321; *Cowie* v. *Foster*, 1 J. & H. 30; *Ferrier* v. *Jay*, L. R., 10 Eq. 550; *Re Teape's Trusts*, L. R., 16 Eq. 442; *Thornton* v. *Thornton*, L. R., 20 Eq. 599. In *Ames* v. *Cadogan*, 12 Ch. D. 868, where a testator devised and bequeathed all property over which he might have "any beneficial power of disposition," *Fry*, J., held that the gift was not a valid exercise of a limited power of appointment to which no reference was made in the will. See also *Tatnall* v. *Hankey*, 2 Moo. P. C. 342.

Appointments by will not referring to power.

Execution of Powers.

an appointment cannot consent by anticipation.

by a deed or instrument in writing, executed in the presence of and attested by three credible witnesses, and inrolled in one of his Majesty's Courts of record at Westminster, and with the consent and approbation of T. H.'s wife, his father, father-in-law, the trustees of a term of 500 years in the settlement of 1770, and also all the trustees to support contingent remainders, being in all nine persons. Every one of these required circumstances is in itself perfectly arbitrary, and (except only as it is in fact required) unessential in point of effect to the legal validity of any instrument by which the old uses should be revoked or new uses declared. It is in itself immaterial whether the instrument in writing, purporting so to revoke and declare the uses, should be by deed; whether such deed should be executed in the presence of what, and how many witnesses; whether it should be afterwards attested by the witnesses, and ultimately inrolled in any Court of record; and whether it should be sanctioned by the consent and approbation of the several trustees named for that purpose. It might (if it had so pleased the parties creating the power) have been done by any writing of the person so authorized, unsealed, unattested, uninrolled, and unsanctioned by any consent or approbation whatsoever. *If these circumstances be unessential and unimportant, except as they are required by the creators of the power, they can only be satisfied by a strictly literal and precise performance.* They are incapable of admitting any substitution, because these requisitions have no spirit in them which can be otherwise satisfied; incapable of receiving any equivalent, because they are in themselves of no value:" *Hawkins* v. *Kemp*, 3 East, 410. See *Jones* v. *Dale*, 1 Barnard, 130; *M'Adam* v. *Logan*, 3 Br. C. C. 310; *Ross* v. *Ewer*, 3 Atk. 156; *Taylor* v. *Johnson*, 2 P. Wms. 504; *Wright* v. *Barlow*, 3 Mau. & S. 512; *Hopkins* v. *Myall*, 2 Russ. & M. 86; *Waterman* v. *Smith*, 9 Sim. 629. And in the case of *Rutland* v. *Wythe*, 10 Cl. & Fin. at p. 425, *Wightman*, J., in delivering his opinion before the House of Lords said: "Whatever arbitrary terms the grantor of the power may impose upon the party executing it, or

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however absurd or unreasonable they may appear to be, they must be fulfilled; as if it were required that the lease should be witnessed by persons of a particular station, or written upon paper of a particular colour; but when the party by whom the power is to be executed is not restrained by the express terms of it, there are no conditions to be added by implication, except such as are necessary to give effect to the conditions which are expressed." So, where the power was to be executed by a will, signed and published in the presence of witnesses, it was held, that a will, signed by the donee privately, and then acknowledged by him before witnesses, was insufficient: *Simeon* v. *Simeon*, 4 Sim. 555; *Jones* v. *Dale*, *ubi supra*, and in Sugd. Pow. 233.

Signature before witnesses.

Wright v. *Wakeford*.

In *Wright* v. *Wakeford*, 4 Taunt. 213; 17 Ves. 454, the power was to be executed by trustees with the consent of the *cestuis que trust*, testified by any writing under their *hands* and seals, *attested* by two witnesses; and it was held that an attestation by two witnesses in these words: "sealed and delivered by the within named," &c., was insufficient (*d*). It was held in the same case, that an attestation by the same witnesses, stating the fact of the signature in their presence, indorsed on the deed subsequently to the death of one of the consenting parties, did not cure the defect. Both of these points occurred in the case of *Doe* d. *Mansfield* v. *Peach*, 2 Mau. & S. 576; and the decision in *Wright* v. *Wakeford* was followed. See also *Wright* v. *Barlow*, 3 Mau. & S. 512. A statement in the body of the instrument that it is duly attested does not cure the defect in the attestation itself: Id. Nor is the evidence of the witnesses admissible to prove that the solemnities on the part of the donee of the power were in fact observed in their presence: *Doe* d. *Hotchkiss* v. *Pearce*, 2 Marsh. 102; 6 Taunt. 402; *Moodie* v. *Reed*, 7 Taunt. 355; 1 Madd. 516. See also *Freshfield* v. *Reed*, 9 Mee. & W. 404; *In the Goods of Eynon*, L. R., 3 P. & M. 92.

(*d*) See, on this point, *M'Queen* v. *Farquahar*, 11 Ves. 467.

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As to supplying defects in execution of power.

It seems that during the life of the donee of the power, defects in the attestation may generally be supplied by means of a *re-execution*, either in the presence of the former or of new witnesses, or by means of a new deed properly executed and attested: *Hawkins* v. *Kemp*, 3 East, 410; 3 Prest. Abst. 75. For, as the previous deed was not a valid execution of the power, it seems that the case must be considered just in the same light as if no deed whatever had been made. According to *Cole* v. *Parkin*, 12 East, 471, new stamps do not appear to be necessary on a re-execution of a deed: *Vide ante*, p. 394. But the death of the appointee, or of the appointor, is an impediment against giving operation to the deed by a subsequent attestation, for a deed cannot commence in operation at a time when the grantee or appointee is not in existence. See *Hawkins* v. *Kemp*, *ubi sup.*

Burdett v. *Spilsbury.*

In *Burdett* v. *Spilsbury*, 10 Cl. & F. 340, it was decided by the House of Lords, reversing the Court of Exchequer Chamber, and concurring in the opinion of the majority of the judges, that a power to be executed by will (before the Wills Act), signed, sealed, and published in the presence of, and attested by, witnesses, was well executed by a will commencing, "I, L. H. S., do publish and declare this to be my last will,"—concluding, "In witness whereof, I have to this my last will set my hand and seal, L. H. S. Witness A., B. and C."

Vincent v. *Bishop of Sodor and Man.*

In *Vincent* v. *Bishop of Sodor and Man*, 4 De G. & Sm. 294, *Wigram*, V.-C., expressed his opinion that the effect of the language of the learned judges who gave their opinions in the case of *Burdett* v. *Spilsbury*, must be taken to be that in the case of a general attestation clause, the narrative may be dispensed with, at least to the extent of holding that a jury might presume that the witnesses saw those acts done, which the donee of the power, in the instrument executing the power, expressed an intention to do, although there should be no evidence that the witnesses were cognizant of the contents of the instrument containing the power." In *Newton* v. *Ricketts*, 9 H. L. Ca. 262, no memorandum of attestation was held to be necessary. See also

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Smith v. *Adkins*, L. R., 14 Eq. 402. In both the cases last cited, attestation of *publication* of a will, as required by the instrument creating the power, was held to be unnecessary.

The common form of attestation of a deed was formerly "sealed and delivered by the within-named A. B. in the presence of." For signing was not essential to the validity of a deed at common law; sealing and delivery alone being sufficient: Perk. s. 130; *Goddard's case*, 2 Rep. 5 a; Co. Litt. 7 a, 35 b. However, since the Statute of Frauds, 29 Car. 2, c. 3, it has been generally thought that all conveyances of lands or hereditaments must be in writing, and signed by the parties making the same, or their agents thereunto lawfully authorized by writing; and, therefore, that signing is now as necessary to the perfection of a deed as sealing. But as an attestation is not essential to the validity of an ordinary deed, *Garrett* v. *Lister*, 1 Lev. 25, and as the Statute of Frauds does not require an attestation, the old form was invariably used in attesting the execution of every kind of deed. But the alarm excited by the decision in *Wright* v. *Wakeford*, 4 Taunt. 213, in consequence of various titles being liable to the same objection, induced the legislature to pass the stat. 54 Geo. 3, c. 168, commonly called Mr. Preston's Act, which enacted that deeds, &c. *already* executed without a memorandum of attestation should be deemed valid.

Since the Stat. of Frauds, a deed should be signed as well as sealed.

The attestation of an ordinary deed need not have the word "signed."

Mr. Preston's Act, 54 Geo. 3, c. 168.

The statute is only retrospective, being limited to transactions prior to the 30th of July 1814. The question may therefore occur in regard to executions of powers after the passing of that Act. To prevent its recurrence as much as possible, every conveyancer should expunge from his common forms any expression which may be considered to require the word "signed" to be inserted in the attestation; and solicitors should, *in every case*, make the attestation, "signed, sealed, and delivered." If the latter precaution were generally adopted, the old form would be forgotten, and the question would never arise: Sugd. Pow. pp. 238, 244 *et seq.*

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But the execution of powers of appointment by will has been placed upon a better footing by the Wills Act, 1 Vict. c. 26, s. 10, which enacts,

Wills Act, appointments by will to be executed like other wills.

"That no appointment made by will, in exercise of any power, shall be valid unless the same be executed in manner hereinbefore required (*e*); and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required (*f*) that a will, made in exercise of such power, should be executed with some additional or other form of execution or solemnity."

Stat. 22 & 23 Vict. c. 35, s. 12 (13th Aug. 1859).

By the stat. 22 & 23 Vict. c. 35, it is enacted that:—

Sect. 12. "A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

(*e*) By sect. 9 all wills are to be executed ". . . by the testator or by some other person in his presence and by his direction; and such signatures shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary."

(*f*) Notwithstanding the use of the words "*shall have been expressly required*," this provision applies to powers created since, as well as to powers created before, the Act: *Hubbard* v. *Lees*, L. R., 1 Ex. 255.

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A signature may be by mark; *Blockhill* v. *Ascott*, 2 Eq. Ab. 659; or by stamping or printing: *Lemaine* v. *Staneley*, 3 Lev. 1; 1 Freem. 538; *Saunderson* v. *Jackson*, 2 Bos. & P. 239.

Signature by mark, &c.

But no further solemnities are required than such as fall strictly within the words of the power. Therefore, a requisition that the instrument shall be executed in the presence of witnesses, is satisfied by an instrument so executed, although the witnesses sign no attestation: *Sayle* v. *Freeland*, 1 Eq. Ab. 345; 2 Vent. 350. And it does not seem to be requisite that the witnesses, when they are required to attest the appointment, should attest it at the same time. See *Ellis* v. *Smith*, 1 Ves. jun. 11; *Simeon* v. *Simeon*, 4 Sim. 555. A power to appoint by writing, signed and sealed, may be exercised by an instrument signed and sealed, but not delivered: *Carter* v. *Carter*, Mosel. 369. And in an old case it was held that if a deed "duly attested" is required, one witness is sufficient: *Poulson* v. *Wellington*, 2 P. Wms. 533. And where a power was given to appoint leaseholds by will, duly executed and *attested*, it was held that there must be an attestation, though one was sufficient: *Sanders* v. *Franks*, 2 Madd. 147. But what shall be a "due" attestation or execution will depend on the nature of the instrument, and the subject-matter of the appointment; and therefore, though a power to appoint real estate by a revocable unattested instrument is good (see 22 & 23 Vict. c. 35, s. 12, above, p. 740), yet a power to appoint, whether by will simply, or by any writing in the nature of a will, can only be exercised by such a will as is valid under the Wills Act. See *Longford* v. *Eyre*, 1 P. Wms. 740; *Casson* v. *Dade*, 1 Br. C. C. 99; *Duff* v. *Dalzel*, Id. 147; *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. sen. at p. 76; *Wagstaff* v. *Wagstaff*, 2 P. Wms. 258; *Jones* v. *Clough*, 2 Ves. sen. 365; Belt's Supp. 360; *Wilkes* v. *Holmes*, 9 Mod. 485; *Willan* v. *Lancaster*, 3 Russ. 108. It seems to have been thought by Lord *Gifford*, M. R., and decided by Sir *J. Copley*, M. R., that a power to dispose of customary lands by will "legally executed," could not be exercised by a will

Sufficient to observe solemnities prescribed.

Attestation of appointment by will.

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not executed according to the Statute of Frauds. See *Tuffnell* v. *Page*, 2 Atk. 37; Barn. 12; 2 P. Wms. 261, n.; *Carey* v. *Askew*, 1 Cox, 243. It is conceived that "due" or "legal" attestation of a deed would mean attestation in conformity with the formalities specified in stat. 22 & 23 Vict. c. 35, s. 12.

Nature of the instrument—deed, or will.

Nature of the Instrument.]—A power at common law to execute by any *deed* or deeds, with or without power of revocation, signed and sealed in the presence of and attested by two witnesses, was held not to have been executed by a *will*, sealed and duly executed and attested: *Earl of Darlington* v. *Pulteney*, Cowp. 260. So, a joint power to husband and wife to appoint by deed was held ill-executed by the husband's will, with an indorsement of the wife's approbation made by her on it after his death; and it would have been no better had the wife ratified it at the time it was made: *Bushell* v. *Bushell*, 1 Sch. & Lef. at p. 96. See *Hulton* v. *Simpson*, 2 Vern. 723; Gilb. Ex. 115; Pr. Ch. 439. In *Darlington* v. *Pulteney*, Lord *Mansfield*, C. J., cited a case, decided in the House of Lords on appeal from Ireland, of *The Countess of Roscommon* v. *Fowkes*, 6 Br. P. C. 158, where a power to appoint by *any writing* signed, sealed, and attested, "and by the same or any *other deed* to grant," &c., was held well executed by a will. See *Ross* v. *Ewer*, 3 Atk. 156. Of course, where the word "deed" does not occur to raise a difficulty, a power to appoint by *any writing* signed, *sealed, and delivered* in the presence of witnesses, may be executed by will: *Doe* d. *Delegal* v. *Holloway*, 1 Stark. 431. See *Edwards* v. *Edwards*, 3 Madd. 197. The will must, however, be sealed: *West* v. *Ray*, Kay, 385; *S. C.*, 23 L. J., Ch. 447; see also *Collard* v. *Sampson*, 4 De G., M. & G. 224; *Moss* v. *Harter*, 2 Sm. & Giff. 458 (*g*).

Testamentary appointment not affected by domicil.

(*g*) A testamentary instrument signed, but not duly attested as required by the law of this country, is not a good execution by a person domiciled in England of a power to appoint by any writing signed, or by will: *Re Daly's Settlement*, 25 Beav. 456;

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Power to married women.

In the case of *Sockett* v. *Wray*, 4 Br. C. C. 483, a fund was limited in trust for the separate use of a married woman for life, and after her decease to transfer the capital to such persons, &c. as she alone, whether sole or covert, should by will appoint: and it was held that, during her coverture, she could not dispose of the capital by deed; though Lord *Alvanley*, M. R., seemed to think that, if her coverture ceased, she might do so: as to which see *Reid* v. *Shergold*, 10 Ves. 370, *contra*. In *Lynn* v. *Ashton*, 1 Russ. & M. 188, where a *feme coverte* had a separate life estate in a fund, with a power to appoint the capital by deed or will, to take effect after her death, was held to have the absolute and immediate dominion over the whole. So, where a life interest was bequeathed with a general power to appoint by will or otherwise, it was held that the legatee might claim the entire fund, and that her bill filed for payment was sufficient without any formal appointment: *Irwin* v. *Farrar*, 19 Ves. 86; and these decisions have been confirmed by *Lempriere's case*, L. R., 4 P. C. 572.

A limitation to the heirs of A., "or as she might choose to will it," was held ill-executed by a deed of disposition executed in Scotland according to the form usual there instead of a will: *Paul* v. *Hewitson*, 2 Myl. & K. 434. But any writing which has received probate in an English Court of competent jurisdiction must be taken to be a will, and, if executed in manner required by the power, must in all courts be received as a proper instrument of appointment: *Douglas* v. *Cooper*, 3 Myl. & K. 378. But this rule does not extend to appointments of real estate, as to which probate is not necessary or conclusive evidence of the testamentary nature of the instrument: *Hume* v. *Rundell*, 6 Madd. 331. See

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S. C., 25 L. J., Ch. 751. But where a will of personalty purporting to be made under a power fulfils the requirements of the power, it will not be affected by the foreign domicil of the testator, as the donee takes under the instrument creating the power, which operates according to the law of the country where it was executed: *In the Goods of Alexander*, 1 Sw. & Tr. 454, n.; *S. C.*, 29 L. J., Prob. 93.

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As to revocation of testamentary appointments by marriage.

Ross v. *Ewer*, 3 Atk. 156; *Shardelow* v. *Naylor*, 1 Salk. 313; *Watt* v. *Watt*, 3 Ves. 244; *Rich* v. *Cockell*, 9 Ves. 369. The question in *Douglas* v. *Cooper*, *ubi sup.*, was, whether a will made during coverture in exercise of a power was not revoked by a second marriage of the appointor, and it was finally held in the Ecclesiastical Court that it was not. Generally a testamentary appointment would be revoked by subsequent marriage if a devise or bequest would have been revoked under similar circumstances: *Hodsden* v. *Lloyd*, 2 Br. C. C. 534. And now every testamentary appointment made by a man or woman is revoked by marriage, "except a will made in exercise of a power of appointment where the real or personal estate thereby appointed would not in default of appointment pass to his or her heir, customary heir, executor, or administrator, or the persons entitled as his or her next of kin under the Statute of Distributions:" Wills Act, 1 Vict. c. 26, s. 18.

Another illustration of the rule, that a power must be strictly executed, is afforded by the doctrine of the case of *Cockerell* v. *Cholmeley*, 3 Russ. 565, where a tenant for life without impeachment of waste, and a trustee with power of sale, joined in a sale of lands, the tenant for life selling the timber and receiving the purchase-money for it, and the trustee selling the land, minus the value of the timber; it was held, that as the timber had not been severed, the power was ill-exercised. But this has now been altered by 22 & 23 Vict. c. 35, s. 13, which gives the Court power on summary application to declare that the sale ought to be established on certain conditions(*h*).

OPERATION OF APPOINTMENT.

Operation of Appointment.]—It is sometimes important, where a power of appointment is given to the person who has the ownership in default of appointment, to know whether a disposition by such person takes effect under his ownership or under the

(*h*) See further, on the question of remedying the defective exercise of powers by the aid of the Court, Sugd. Pow. pp. 533 *seq.*; Farwell, Pow. 259.

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power. On this point, in the case of *Langley* v. *Sneyd*, 7 J. B. Moore, at p. 183, *Park*, J., cited the rule laid down in *Parker* v. *Kett*, 1 Ld. Raym. 660; 1 Salk. 96: "When a man does such an act as cannot be good by any other means but by virtue of his authority, it shall be intended to be in execution of his authority; but when a man has an interest and an authority, and does an act without writing his authority, it shall be intended to be done by virtue of his interest." See *Sir Edward Cleere's case*, 6 Rep. 18 a; *Wagstaff* v. *Wagstaff*, 2 P. Wms. 260; *Maundrell* v. *Maundrell*, 10 Ves., at p. 257.

Whether instrument operates under the power or the ownership.

In *Sir Edward Cleere's case*, the appointor had conveyed to such uses as he should appoint by will, taking a resulting use in fee; and it was held that a general devise operated under the ownership to pass two-thirds (the land being held by knight's service *in capite*), and not under the power to pass the whole. But of course had an intention appeared to pass the whole, that intention, as it could not have been satisfied by a devise under the ownership, would have made the will operate by appointment. See *Tomlinson* v. *Dighton*, Salk. 239; 10 Mod. 31; *Lord Leicester's case*, 1 Vent. 278; *Kibbet* v. *Lee*, Hob. 312; *Campbell* v. *Leach*, Ambl. 740; *Wade* v. *Paget*, 1 Br. C. C. 364; *Blake* v. *Marnell*, 2 Ball & B. 35; *Denn* v. *Roake*, 8 Dowl. & Ry. 514; *S. C.* 5 B. & Cr. 720; *Farmer* v. *Bradford*, 3 Russ. 354; *Roe* v. *Archbishop of York*, 6 East, 86; *Doe* d. *Daniel* v. *Keir*, 4 Man. & Ry. 101; where an instrument purporting to be an appointment, but which failed by reason of an estate in remainder being given by it to one of the witnesses (the power requiring *credible* witnesses), was held to operate as a conveyance under the ownership: but see now as to wills, stat. 1 Vict. c. 26, s. 14.

Apparent intention.

Where a conveyance is expressly made under the ownership, and an appointment under the power, the intention apparent on the face of the instrument will determine in which way it shall operate: *Cox* v. *Chamberlain*, 4 Ves. 631; *Roach* v. *Wadham*, 6 East, 289; 2 Smith, 376. In *Langley* v. *Brown*, 2 Atk. 195, a tenant in tail having a general power of

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appointment, and the ultimate reversion in fee, by deed, appointed, limited, gave, and granted the estate and the reversion expectant on her death to her intended husband (who was in possession) in fee, charged with moneys to be paid after her death. It was held, that though the deed was capable of operating by release, it should not, as the intent appeared to be not to convey any estate during the lady's life. See also *Farmer* v. *Bradford*, 3 Russ. 354.

Roach v. *Wadham.*

The case of *Roach* v. *Wadham*, *ubi sup.*, was shortly this: By indentures of lease and release, dated the 23rd and 24th of June, 1791, the plaintiffs conveyed an undivided part of a certain messuage unto T. Coates and his heirs, to such uses as W. Watts should by deed or will appoint; and, in default of appointment, to the use of W. Watts, his heirs and assigns, for ever; yielding and paying, and the said W. Watts, and, by his direction, the said T. Coates, granted unto the plaintiffs, their heirs and assigns, for ever, the yearly fee-farm rent of 28*l.*, payable, &c. And W. Watts, for himself, his heirs, and assigns, covenanted and granted with the plaintiffs, their heirs and assigns (amongst other things), that he, Watts, his heirs and assigns, would pay, or cause to be paid, to the plaintiffs, their heirs and assigns, the said yearly rent of 28*l.*, on the days, &c. aforesaid.

By indentures of the 25th and 26th of September, 1792, in consideration of 1,000*l.* paid to and by the direction of W. Watts, by Wadham and Stevens, the said Coates, by the direction of W. Watts, did, according to his estate and interest, bargain, sell, and release, and the said W. Watts did bargain, sell, alien, release, ratify, and confirm, *and also direct*, *limit*, *and appoint*, unto the said Wadham and Stevens, and one Powell, and to their heirs, the said hereditaments; to hold the same unto and to the use of them and the heirs and assigns of the said Wadham and Stevens, for ever, as tenants in common, in trust as to the estate of Powell for Wadham and Stevens, their heirs and assigns, as tenants in common, subject to the rent reserved by the last-mentioned indenture. And Wadham and Stevens respectively covenanted with Watts, his

heirs and assigns, to pay such rent in equal moieties, and to perform the covenants contained in the said indenture, and to indemnify Watts, his heirs and assigns, therefrom. Wadham died, and the present action was brought against his devisee and executor by the covenantees (parties to the indenture of 1791), to recover a moiety of the rent. Against the plaintiff's claim it was contended that, inasmuch as the conveyance to the testator operated as an appointment, by virtue of the power reserved to Watts, and not a release out of his ownership, there was no privity of estate between Wadham, the testator, and Watts, the covenantor, and consequently Wadham was not bound; and this was not denied on the other side, the great contest being, whether the deed operated as an appointment or release; and the Court being of opinion that the deed took effect under the power, and not as a grant of the interest, it was considered as consequential on this decision that the action could not be maintained.

Lord *Ellenborough*, C. J., is reported to have said: "The only point was, whether the conveyance operated on the interest which Watts had, or as an execution of the power; and it was a question of mere intention; and if that be so, it ought to appear very clearly that the covenants and provisions in the deeds cannot take effect, if the conveyance should be holden to operate as an appointment, in order to authorize the Court so to determine where the instrument in its terms professes to make an appointment, and where Coates, the trustee, joins in the conveyance, and by the direction of Watts, bargains, sells, and releases to Wadham. Had it been the intention of the parties that the estate which Wadham was to take should be derived *out of the interest* which Watts had, it would have been wholly unnecessary that Coates should have been a party to the deed; his being made a party to it shows that *something* was to be taken by way of appointment, and, if anything, there is nothing from whence there can be collected an intention that *less than the whole* should pass by those means; the reason for which is obvious, as it might prevent such

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objections to the title as might be made if it were derived immediately from Watts."

Remarks upon *Roach* v. *Wadham*.

It seems impossible to divine how the adding of a releasee to uses, whose *scintilla juris*, if he ever had any, was then extinct, as a party to an assurance, could indicate an intention that the assurance should operate as an appointment by another person, and how such an intention could have been collected from the instrument, when the consequence of its operating by way of appointment was, that limitations evidently intended to carry the use and the legal estate were reduced to mere declarations of trust. See *Doe* d. *Worger* v. *Haddon*, 4 Man. & Ry. 118. And see the observations of Lord *St. Leonards* on *Roach* v. *Wadham*, in Sugd. Pow. 359.

Wynne v. *Griffith*.

In *Wynne* v. *Griffith*, 1 Russ. 283 ; 10 J. B. Moore, 592; 8 Dowl. & Ry. 820; 5 B. & Cr. 923, *S. C.*, estates were limited to such uses as Humphrey Roberts and wife, Mary Roberts and Catherine Roberts, should jointly appoint; in default of appointment, to such uses as Humphrey Roberts and wife, and Mary Roberts, if they should survive Catherine, should appoint; and in default of appointment, as to part of the estates, to the use of Catherine for life; and as to all (subject to Catherine's life estate) to such uses as Humphrey should appoint; and in default of appointment, to the use of Humphrey in fee. All the four executed a settlement by lease and release, by which they granted, bargained, sold, released, and confirmed, directed, limited, and appointed unto A., B., C., and D. (in their actual possession, &c.), the estates included in the power, with other estates, to hold to them, their heirs, and assigns, to the then subsisting uses until an intended marriage took effect, and then to uses in strict settlement, including limitations to trustees to preserve contingent remainders, and a limitation of a term to the trustees. The case was sent by the Master of the Rolls successively to the Courts of Common Pleas and King's Bench, and the judges of both Courts certified that the legal fee did not vest in A., B., C., and D., *i. e.*, that the settlement operated by way of conveyance by Catherine Roberts and Humphrey

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Roberts, and not by way of appointment by the four. It was suggested by *Bayley*, J., towards the close of the argument in the King's Bench, that an operation might be given to every word, by supposing Catherine and Humphrey to convey to the releasees, and then the four who have the power to direct, limit, and appoint to the uses thereinafter mentioned: "For," the learned judge observed, "the deed does not profess to grant to the use of the releasees. There is not any single use declared in their favour." But this construction is untenable; for though there was no appointment to the use of the releasees, there was an appointment to them who carried the use if the appointment operated at all. There was clearly an error in the frame of the deed, and the most effect that, consistently with the intention, could possibly be given to the operative words, was to hold that the parties having the legal estate conveyed, and the parties having the power joined, for the purpose of putting an end to their power.

POWER OF REVOCATION.

A power of revocation and new appointment may be reserved without authority.

Power of Revocation.]—Under a power of appointment, the donee may either appoint absolutely, or, in the deed executing the power, he may reserve a power of revocation and new appointment, although not expressly authorized to do so by the deed creating the power; *Adams* v. *Adams*, Cowp. 651; *Earl of Cardigan* v. *Montague*, Sugd. Pow. 918; and such powers may be reserved *toties quoties*: *Lady Hastings' case*, 3 Keb. 7; *Becket's case*, Lane, 118; *Hele* v. *Bond*, Pr. Ch. 474; 1 Eq. Ca. Abr. 342, pl. 6; Sugd. Pow. 387, 908; *Digges' case*, 1 Rep. 173 b. And where even a particular power is given to two persons, or the *survivor of them*, with or without power of revocation, they may execute a *joint* appointment, and reserve to the survivor a power of revocation and new appointment: *Brudenell* v. *Elwes*, 1 East, 442; 7 Ves. 382. See also *Montagu* v. *Kater*, 8 Ex. 507.

The donee may regulate the mode of revocation; but not the future appointment.

The donee may regulate the mode of revocation, as it need not be attended with the same solemnities as the power of appointment; *Winstanley's case*, cited 3 Keb. 7; but he cannot, on a future appointment, dispense with the necessity of conforming to the requisites of the original power; Prest. Watk. Conv.

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149; *Sir S. Jones* v. *Lady Manchester*, Ventr. 197; for, by the revocation, the original power is revived: 2 Pres. Abs. 274, 277. The rules with regard to the effect upon the original powers and uses of a settlement, of successive executions by deed of the powers, with a reservation of new powers in each case, are laid down in *Saunders* v. *Evans*, 8 H. L. C. 721.

Appointment by will is revocable, *aliter* if by deed.

A *will* is always revocable; and therefore, where the power is executed by will, an express power of revocation need not be reserved: *Hatcher* v. *Curtis*, 2 Freem. 61; 2 Eq. Ab. 671, pl. 3. And see *Lisle* v. *Lisle*, 1 B. C. C. 533; *Laurence* v. *Wallis*, 2 B. C. C. 319. But where the power is executed by *deed*, unless a power of revocation be reserved in the deed, the appointment cannot be revoked, although there be a power of revocation in the instrument creating the power; *Worrall* v. *Jacob*, 3 Meriv. 256; or, although the appointment is to volunteers; *Bolton* v. *Bolton*, 3 Swanst. 414, n. See *Naldred* v. *Gilham*, 1 P. Wms. 577; and even if the original power expressly authorize the donee in the most unlimited terms to appoint, and to revoke his appointments from time to time; for the law will not endure a prospective power like this, but on every execution a new power of revocation must be reserved: *Hele* v. *Bond*, Pr. Ch. 474; Sudg. Pow. (App.) 908. The decisions as to the necessity of reserving a power of revocation in order to authorize a party to revoke an appointment by deed, have always been considered to apply to personal as well as to real estate: Sugd. Pow. 390. A power of sale, in whatever form it may be given, implies a power of revocation and new appointment: *Bishop of Oxford* v. *Leighton*, 2 Vern. 376.

Power of revocation implies a power to limit new uses, when.

And although in the *original* settlement there be only reserved a power to revoke the uses thereby declared, yet a power is implied to limit new uses out of the first seisin, and may be executed accordingly: *Fowler* v. *North*, 3 Keb. 7; *Smith* v. *Wheeler*, 1 Ventr. 128; *S. C.*, 1 Lev. 270. "For he that has power to revoke, has power to limit:" *S. C.*, nom. *Witham and Bland's case*, 3 Swanst. 277, n. And see Sugd. Pow. 371. However, it is otherwise if a con-

trary intention can be collected from the whole settlement, or if an estate be settled to uses with a power of revocation, and it be declared, that upon the revocation the uses shall cease, and the estate shall remain to the use of the settlor and his heirs; after revocation he cannot limit new uses out of the old seisin, it being exhausted on the execution of the use to him in fee: *Atwaters* v. *Birt*, Cr. El. 856. New uses can only be raised by means of a conveyance under the ownership.

But every power reserved in a deed *executing* a power will be strictly construed; and therefore a mere power of revocation in such a deed will not authorize a limitation of *new* uses: *Digges' case*, 1 Rep. 173 b.; *Ward* v. *Lenthall*, 1 Sid. 343.

It seems that a power of revocation may be reserved on the execution of a power simply collateral.

Upon the authority of *Wall* v. *Thurborne*, 1 Vern. 355, 414, it has been thought, that a power of revocation cannot be reserved on the execution of a power *simply* collateral, when it is not authorized by the original power. In that case the wife had a power under her husband's will to appoint an estate amongst her daughters; and she executed the power with power of revocation, but never actually revoked the settlement. "As to the power of revocation," it was said, "the case may be eased of that, for it was only an authority in the wife; and that being once executed, she could not reserve such power to herself. But in *Re Austin* (27th of July, 1823), Sugd. Pow. 388, the Vice-Chancellor said, that this point had been long overruled; it was now decided, that those who can make an absolute appointment can also make a qualified one.

Donee not bound to reserve a power of revocation.

If a power require the deed of revocation and limitation of new uses to contain a power to revoke by deed, yet upon the execution of such reserved power of revocation the donee need not reserve another power to revoke: *Phillips* v. *Phipps*, V. C., M. T., 1818; Sugd. Pow. 389.

Power may be so expressed as to require an irrevocable appointment.

A power may, of course, be so expressed as to show that any appointment to be made in exercise of it is to be irrevocable: *Piper* v. *Piper*, 3 Myl. & K. 159, where Lord *Brougham*, C., said, at p. 166: "Suppose the instrument creating the power had

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fixed the day when it must be executed, it seems impossible to doubt that revocation would have been excluded, because there could be nothing more contrary to the constitution of the power than such an execution of it. In like manner I should have no doubt that, if a power is directed to be executed on or before a given day, a clause of revocation may be inserted, but then it can only enable the new appointment under it to be made on or before the given day; that is, the whole execution must be within the limits prescribed." See also *Cooper* v. *Martin*, L. R., 3 Ch. 47.

TIME OF EXECUTION.

Time when power may be executed.

Time of Execution.]—Generally a power may be executed at any time during the life of the donee; *Coleman* v. *Seymour*, 1 Ves. sen. 209; *Parsons* v. *Parsons*, 9 Mod. 464; but it must be completely executed as to every formality within that time. Sometimes the continuance of the power is expressly limited, and then the spirit and not the letter of the limitation will be regarded. Thus, where an estate was limited to trustees upon trust to convey to the *cestuis que trust* at a certain period, and a power of sale was given to the trustees "during the continuance of the trusts," it was held that the trustees, having neglected to convey to the *cestuis que trust* at the proper period, could not afterwards exercise the power, although the trusts were in one sense still continuing: *Wood* v. *White*, 2 Keen, 664. So a power given to A., to be exercised by her before her youngest son should attain twenty-five years of age, was held not to be validly exercised by a will made before, but not coming into operation till after her youngest son had attained twenty-five years of age: *Cooper* v. *Martin*, L. R., 3 Ch. 47. See also *Horlock* v. *Smith*, 17 Beav. 572. Where a consent is required to the exercise of a power it must be obtained previous to the appointment: *Cocker* v. *Quayle*, 1 Russ. & M. 535; *Bateman* v. *Davis*, 3 Madd. 98; *Wills* v. *Gresham*, 2 Drew. 258.

Power to be exercised on a contingency.

Where the appointment is only to take effect on a contingency, a question may arise whether an appointment, made before the contingency happens,

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will become effectual when it does happen. In *The Countess of Sutherland* v. *Northmore*, 1 Dick. 56; *S. C.*, *nom. Sclater* v. *Travell*, 3 Vin. Ab. 427, pl. 8, a power was given to a married woman, in case of the death of her husband in her lifetime, and if there should be a failure of issue of the marriage living at her death, to charge portions. She executed the power in her husband's lifetime, and after his death died, leaving no issue of the marriage; and the appointment was held good. See *Goldsmid* v. *Goldsmid*, Turn. & R. 445. So, in *Dalby* v. *Pullen*, 9 Moore, 300, where land was devised to A. for life, with remainder to her son in fee, but in case he should die without issue in A.'s lifetime, and there should be no issue of her body then living, to such uses as she should appoint by deed or will. It was held that an appointment and conveyance by A. and her son was a good execution of the power, upon the event happening of the son's death in A.'s lifetime and failure of the issue of A.

Sclater v. *Travell.*

In *Ashford* v. *Cafe*, 7 Sim. 641, a testator bequeathed a fund in trust for his daughter for life, and after her death to be transferred to his niece, her executors, &c. in case she should be then unmarried, but if she should be then married, to be transferred to such persons as she, *whether sole or married*, should by deed or will appoint, and in default of appointment the interest to be paid for her separate use for life, and the capital to her executors. The niece married after the testator's death, and an appointment by her by will during her coverture, and in the lifetime of the daughter, was held a good exercise of the power.

Ashford v. *Cafe.*

In *Clark* v. *Seymour*, 7 Sim. 67, a reversion in fee was settled in strict settlement, with a power for the trustees at any time thereafter, with the consent of the tenant for life under the settlement, to sell or exchange the lands for other lands in fee *in possession*. It was held that a sale by the tenant for life in possession, the tenant for life under the settlement, and the trustees, was a good exercise of the power, and it would have been the same had the tenant for life in possession not joined. An objection that might have been taken to the sale as made,

Clark v. *Seymour.*

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namely, that the power required the trustees to sell for a separate consideration, had been waived by the purchaser. See Butl. Co. Litt. 271, b., n. In *Coxe* v. *Day*, 13 East, 118, an estate was settled to A. for life, remainder to his sons for life, with power to A. during his life, and *after his decease* to his son, to lease. The father having conveyed his life estate to his son, the son leased during his father's life, but the lease was held not to be authorized by the power.

Contingency as to the person.

But where there is a contingency as to the person who is to execute the power, an appointment by anticipation will not generally be supported. Thus, in *Doe* d. *Calkin* v. *Tomkinson*, 2 Mau. & S. 165, where a testator devised all his estate to his two sisters, or to the survivor of them, and to be disposed of by the survivor as she might by will devise, it was held that there was no tenancy in common, and that a will made during the lives of both sisters by the sister who eventually survived, was not an execution of the power. Lord *Ellenborough*, C. J., distinguished *Sclater* v. *Travell*, *ubi supra*, observing that there the power was given to a designated person to be executed on a contingency; here it was given to a contingent person. And a joint appointment, where the power is to be executed by the survivor, is equally bad: *M'Adam* v. *Logan*, 3 Br. C. C. 310. See *Hole* v. *Escott*, 2 Keen, 444; 4 Myl. & Cr. 187.

Doe d. *Calkin* v. *Tomkinson*.

Consent.

When a power is to be exercised with the consent of any person, the obtaining of such consent is generally (see *Lee* v. *Vincent*, Cr. El. 26) a condition precedent to the exercise of the power; and an execution made without consent will not be set up by subsequent assent. This was decided by the Court of Common Pleas in the case of *Greenham* v. *Gibbeson*, 4 Moo. & Sc. 198, upon a power to vary securities with the consent of trustees; and in Chancery in the case of *Bateman* v. *Davis*, 3 Madd. 98, upon a power to trustees of a marriage settlement to raise a sum of money for the husband with the consent of the wife. See *Cowgill* v. *Lord Oxmantown*, 3 You. & C. 369.

It was thought, in an early case, that when the written consent of a person is made necessary to the validity of an appointment, and such person merely

joins in the deed of appointment for another purpose, without expressly assenting, there is not such an assent as the power requires, and this seems to be the correct opinion: *Lord Mordaunt* v. *Earl of Peterborough*, 3 Keb. 305.

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Exclusive and Illusory Appointments.]—Under a power to appoint "to all and every the child and children," *Pocklington* v. *Bayne*, 1 B. C. C. 450; *Bulteel* v. *Plummer*, L. R., 6 Ch. 160, or "unto and among" the children of different persons, every one must have a share: *Malin* v. *Keighley*, 2 Ves. jun. 333, 529. So even under a power of disposal "unto and among *such* children begotten between us, and in such proportion," as the wife shall appoint; it was held that no child could be excluded: *Alexander* v. *Alexander*, 2 Ves. sen. 640. See also *Strutt* v. *Braithwaite*, 5 De G. & Sm. 369; *Re David*, Joh. 495; *Robinson* v. *Sykes*, 23 Beav. 40.

ILLUSORY APPOINTMENTS.

Power of selection.

What words will not authorize an exclusive appointment.

However, powers to appoint "to such of my children, as my wife shall think fit;" *Lief* v. *Saltingstone*, 1 Mod. 189; "to one or more of my children, as my wife shall think fit;" *Thomas* v. *Thomas*, 2 Vern. 513; "to be at my wife's disposal, provided it be to any of my children;" *Tomlinson* v. *Dighton*, 1 P. Wms. 149; "amongst all or such of my children;" *Macey* v. *Shurmer*, 1 Atk. 389; "to and amongst such of my relations, in such parts, shares, and proportions, as my wife shall think proper;" *Spring* d. *Titcher* v. *Biles*, 1 T. R. 435, n.; "for the use of such of the children or child, and issue of the marriage, as well male as female, and in such shares, parts, and proportions, and for such estate or estates;" *Doe* d. *Wilmett* v. *Alchin*, 2 B. & Al. 122; "unto and amongst all *such* child or children of A., in such parts, shares, and proportions, manner and form, as B. should appoint;" *Wollen* v. *Tanner*, 5 Ves. 218: see also *Tucker* v. *Tucker*, 13 Pri. 607; *Swift* d. *Huntley* v. *Gregson*, 1 T. R. 432; have been held to enable the donees to appoint exclusively to any of the objects: Sugd. Pow. 444. In *Veale's Trusts*, 4 Ch. D. 61, *Jessel*, M. R., held that "to and amongst my other children *or* their issue in such shares, &c.,"

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created an exclusive power, and this decision was affirmed 5 Ch. D. 622. So in *Chamberlain* v. *Napier*, 15 Ch. D. 614, it was held that a gift to "*such* child or children" as A. should appoint created an exclusive power. The word "such," standing unexplained, imports an intention to give the power of selection: *Burleigh* v. *Pearson*, 1 Ves. 281.

Kemp v. *Kemp*.

In *Kemp* v. *Kemp*, 5 Ves. 849, Lord *Alvanley*, M. R., held, that a power to appoint "amongst the children as the donee shall think proper," did not authorize an exclusive appointment. He treated the word "amongst" as equivalent to "all and every," which words are mandatory that each shall have a share. And in *Gibson* v. *Kinvin*, 1 Vern. 66, upon a gift to the wife "upon trust and confidence that she would not dispose thereof but for the benefit of her children," it was determined that no child could be excluded. If there is a power of selection among a class, and in the event there is only one individual of that class, such one must take the whole: *Roe* d. *Buxton* v. *Dunt*, 2 Wils. 336.

Garthwaite v. *Robinson*.

In *Garthwaite* v. *Robinson*, 2 Sim. 43, power was given to A. to dispose of a certain fund "in such manner as she thinks fit, amongst *all or any one or more of* her children, if she should have any; and if she hath none, then amongst my present or future grandchildren or their respective issue, as she likes best." It was admitted that this was a power of selection as to the *children;* and the question was, whether the words in italics applied also to the *grandchildren*, so as to call for the same construction as to them; the Court held, that the words did not extend to the grandchildren, and that A. was bound to give to each grandchild living *at her death* a substantial share.

At law any share, however nominal or illusory, satisfied the terms of the power: 1 T. R. 438, n.; 5 Ves. 861. But previously to Lord St. Leonards' Act (11 Geo. 4 & 1 Will. 4, c. 46) (*i*), in equity

(*i*) This statute is retrospective in its operation as regards powers created before but exercised after the passing of the Act: *Reid* v. *Reid*, 25 Beav. 469.

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some shares must have been given which did not come within the meaning of an illusory appointment. That Act, however, enabled the donee of a power of distribution to exercise the power in favour of the objects, by apportioning the subject among them in *any* shares, however unequal, instead of being obliged, as before, to give to each object a substantial share. The Act (*j*) is intituled, "*An Act to alter and amend the law relating to illusory appointments:*" and enacts that:—

Stat. 1 Will. 4, c. 46, respecting illusory appointments.

Sect. 1. "That no appointment which, from and after the passing of this Act, shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity on the ground that an unsubstantial, illusory or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory or nominal share of the property subjected to such power."

Illusory appointments shall be valid in equity as well as at law.

Sect. 2. "That nothing in this Act contained shall prejudice or affect any provision in any deed, will or other instrument creating any such power as aforesaid, which shall declare the amount of the share or shares from which no object of the power shall be excluded."

Not to affect any deed which declares the amount of the share;

Sect. 3. "That nothing in this Act contained shall be construed, deemed or taken, at law or in equity, to give any other validity, force or effect, to any appointment, than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to or left unappointed to devolve upon any object of such power."

nor to give any other force to any appointment than the same would have had.

This statute has been considered to require that, in the case of the exercise of a non-exclusive power, some share, however trifling in amount, should be either given to every object of the power or left undisposed of so as to devolve upon all the objects in default of appointment: *Bulteel* v. *Plummer*, L. R., 6 Ch. 160. And see *Minchin* v. *Minchin*, 3 Ir. Ch.

(*j*) See note (*i*), *ante*, p. 756.

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Rep. 167. This doctrine was, however, disapproved of in the recent case of *Re Capon's Trusts*, 10 Ch. D. 484, that an appointment since the Illusory Appointments Act under a non-exclusive power of an entire fund among a class, "and the survivors and survivor of them, and if only one should survive, then unto that one," was valid.

Stat. 37 & 38 Vict. c. 37 (30th July, 1874).

And by the stat. 37 & 38 Vict. c. 37, it was enacted:—

Appointments to be valid notwithstanding one or more objects excluded.

Sect 1. "That no appointment, which from and after the passing of this Act shall be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity, on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual, notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to such power."

Proviso.

Sect. 2. "That nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount of the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded."

EXCESSIVE EXECUTION OF A POWER.

Excessive Execution of Powers.]—An appointment may be in excess of a power, as contravening either the general rules of law, or the terms of the particular instrument creating the power.

The rule against perpetuities.

It has been said (*ante*, p. 732) that an appointee claims not under the appointment, but under the instrument creating the power. An important consequence of this doctrine is that in preparing an appointment, whether by deed or will, whereby it is intended that successive estates should be limited, care must be taken that the limitations do not transgress the rule against perpetuities. The subject of perpetuities will be fully discussed in a later volume of this work under the title of WILLS, and the question of the infringement of the rule by testamentary and other appointments will be then examined at some length. It will, however, be convenient to offer here a few remarks on this subject.

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Distinction between general and particular powers.

With respect to the estates which may be created under powers without infringing the rule against perpetuities, an important distinction exists between general and particular powers. A general power, whereby the donee has a right to appoint to any person he thinks proper, enables the donee to vest the fee in himself or in any other person, and thus gives him absolute power to dispose of the property, which he may exercise by appointing it by way of sale or mortgage, or otherwise as he may think proper. Any estates, therefore, which may be created by a person seized in fee may equally be created by the donee of a general power of appointment, and the limitations will be deemed to commence from the time, not of the creation of the power, but of its exercise: Sugd. Pow. 395. But with regard to a qualified or particular power, which enables the donee to appoint only to or among particular objects, the case is entirely different. Although the donee may have power to limit the property in fee, he cannot do so *as if he himself were owner in fee:* the restriction as to the objects to whom he may appoint takes the land out of the market, and tends to a perpetuity rendering the land inalienable beyond what the law of England permits. See Butler's note to Co. Litt. 272 a, sect. vii. 2. On this point, Lord *St. Leonards* says: "It is well established that under a particular power, as a power to appoint to children, no estate can be created which would not have been valid if limited in the deed creating the power. The test of the validity of the estates raised is to place them in the deed creating the power, in lieu of the power itself." See Sugd. Pow. 396. See also *Massey* v. *Barton*, 7 Ir. Eq. Rep. 95.

Distinction as to powers created by will.

A material distinction must also be drawn in these cases between deeds and wills; a deed takes effect immediately on its execution; a will takes effect only as from the testator's decease; limitations therefore may be good if appointed in exercise of a power *created* by will, which would be void if in exercise of a similarly worded power *created* by deed of the same date. See *Duke of Devonshire* v. *Lord E. Cavendish*, 4 T. R. 741; *Peard* v. *Kekwich*,

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15 Beav. 166; *Wilkinson* v. *Duncan*, 30 Beav. 111. This distinction does not apply to the instrument *executing* the power: for it makes no difference in the construction of a limitation, as regards perpetuities, whether the appointment itself is by deed or will: Sugd. Pow. 397.

What estates may be created.

A person having a power to appoint to children, absolutely, may appoint to a child an estate for life, giving him also a *general* power of appointment by deed or will; *Bray* v. *Bree*, 2 Cl. & Fin. 453; or a *general* power of appointment by will only, provided the donee of the last-mentioned power is, at the time of its creation, *in esse; Phipson* v. *Turner*, 9 Sim. 227. See also *Brudenell* v. *Elwes*, 1 East, 442; *Morse* v. *Martin*, 34 Beav. 500; *Slark* v. *Dakyns*, L. R., 10 Ch. 35; but not if the donee was not then *in esse: Wollaston* v. *King*, L. R., 8 Eq. 165. See also *Morgan* v. *Gronow*, L. R., 16 Eq. 1, where a person having, under his marriage settlement, power to appoint amongst his children, appointed a portion of the trust funds upon such trusts to take effect after the marriage of his daughter (then unmarried), as she should by will appoint, and in the meantime upon trust for her for life, and after her death as she should by will appoint: Lord *Selborne*, C., held that the appointment was void in all respects, except as to the life interest. See also *D'Abbadie* v. *Bizoin*, Ir. R., 5 Eq. 205.

Unborn child.

Under a power of appointment amongst children, it is settled that an unborn son may be made tenant for life, either without limiting any remainder, or together with a vested remainder to another object of the power who is *in esse; Routledge* v. *Dorril*, 2 Ves. jun. 357; but the estate cannot be appointed to the children of the unborn tenant for life as purchasers: *Brudenell* v. *Elwes*, 1 East, at p. 452. See also *Hay* v. *Lord Coventry*, 3 T. R., at p. 86.

Restraint on anticipation.

Appointments to a daughter with restraint on anticipation have frequently been held to infringe the rule against perpetuities. In *Re Teague's Settlement*, L. R., 10 Eq. 564, a widow, having power under her marriage settlement to appoint amongst her children, executed a deed appointing to a mar-

ried daughter a share of the trust funds for her separate use without power of anticipation, with remainder as she should generally appoint by deed or will: the restraint on anticipation was held to be void and was rejected, so as to render the appointment valid in other respects. See also *Fry* v. *Capper*, Kay, 163; *Thornton* v. *Bright*, 2 My. & Cr. 230; *Re Cunynghame's Settlement*, L. R., 11 Eq. 324. Where a similar appointment was made to an unmarried daughter, her subsequent marriage will not operate as an adoption of the trusts of the fund, so as to render valid the restraint on anticipation: *Re Teague*, *ubi sup.* "It is well settled that a gift under a power *embracing objects not within the line of perpetuity* is wholly void, and the fund cannot be given to those to whom it might have been legally appointed:" Sugd. Pow. 505. See also *Routledge* v. *Dorril*, 2 Ves. jun. 357. Execution of Powers.

The general rule, with regard to appointments in excess of the terms of the power, is thus laid down by Sir *T. Clarke*, M. R.: "The ground and principle of all this is that, where there is a complete execution of a power and something *ex abundanti* added, which is improper, then the execution shall be good, and only the excess bad; but where there is not a complete execution of a power, where the boundaries between the excess and the execution are not distinguishable, it will be bad:" *Alexander* v. *Alexander*, 2 Ves. sen., at p. 644. See also *Pawlet* v. *Pawlet*, 1 Wils. 224. In *Sadler* v. *Pratt*, 5 Sim. 632, where a power purported to be completely exercised by an appointment, to which was attached an unauthorized condition, the appointment was upheld *pro tanto*, rejecting the condition. See also *Stroud* v. *Norman*, Kay, 313, 327; *Watt* v. *Creyke*, 3 Sm. & Giff. 362. An appointor cannot, of course, annex any condition for his own benefit: *Roberts* v. *Dixale*, 2 Eq. Ca. Abr. 668, pl. 19; *Bailey* v. *Lloyd*, 5 Russ. 330. Where an appointment otherwise in accordance with the terms of the power is made, subject to an unauthorized charge, the charge will be rejected and the appointee will take free therefrom: *Re Jeaffreson*, L. R., 2 Eq. 276. See also *Richardson* v. *Simpson*, 3 J. & L. 540; Appointments in excess of the terms of the power. Unauthorized condition.

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Cowx v. *Foster*, 1 J. & H. 30; *Butler* v. *Butler*, 7 L. R., Ir. 401. So also where an appointment was made with an unauthorized direction to pay the portion at the age of twenty-one or day of marriage, the appointee took immediately a vested interest in the portion: *Dillon* v. *Dillon*, 1 Ball & Be. 77. But where the condition cannot be separated from the exercise of the power, the appointment will be wholly void: *Webb* v. *Sadler*, L. R., 8 Ch. 419.

Appointment to strangers.

A gift to a person who is an object of the power, with a gift over to one who is not an object, is void only as to the gift over; *Brown* v. *Nisbet*, 1 Cox, 13. See also *Jackson* v. *Noble*, 2 Keen, 590 (a case which will be fully considered, *post*, tit. Wills); *D'Abbadie* v. *Bizoin*, Ir. R., 5 Eq. 205; *Webb* v. *Sadler*, *ubi supra;* but where the original gift is of an interest terminable on a certain event, the interest will determine on the happening of that event, notwithstanding that the gift over, being to a stranger, is void: *Doe* d. *Blomfield* v. *Eyre*, 5 C. B. 713. Where there is a gift for life to a stranger for life, with remainder to an object of the power, the gift in remainder is good, and the property will, during the life of the stranger, go as in default of appointment: *Crozier* v. *Crozier*, 3 Dr. & W. 353. See also *Chester* v. *Chadwick*, 13 Sim. 102. In the case, however, of a testamentary appointment, the remainder may be accelerated, if such appears to be the testator's intention: *Craven* v. *Brady*, L. R., 4 Ch. 296.

Appointment for life.

But it has been settled by numerous decisions that where there is an appointment among the objects of the power, with a direction that the shares shall be held in trust for them for life, with remainder to their children, the appointment will give to the objects an absolute interest: *Carver* v. *Bowles*, 2 Russ. & My. 301; *Kampf* v. *Jones*, 2 Keen, 756; *Blacket* v. *Lamb*, 14 Beav. 482; *Harvey* v. *Stracey*, 1 Drew. at p. 137; *Re Lord Sondes's Will*, 2 Sm. & Gif. 416; *Churchill* v. *Churchill*, L. R., 5 Eq. 44.

Delegatus non potest delegare.

Where an appointment purports to give to a stranger a power of appointing the property among the objects of the original power, and in default of such appointment the property is given among the

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proper objects, the power of appointing will alone be void, according to the maxim *delegatus non potest delegare*, and the gift in default of appointment will take effect immediately: *Ingram* v. *Ingram*, 2 Atk. 88.

Doctrine of *cy près* not applicable to appointments by deed.

The discussion of the doctrine of *cy près* will be postponed to a later volume (tit. WILLS), as it does not apply to appointments by deed: *Brudenell* v. *Elwes*, 1 East, 442.

Excess in quantity of estate.

The general principle as to the validity of appointments with respect to the quantity of estate appointed, is that appointments will be regarded in equity as in due execution of the powers, provided they substantially carry out the intentions of the creator of the power, notwithstanding that there may be a departure from the strict terms of the powers in point of form or separable detail. A power to charge a particular sum, as 7,000*l.*, will be duly executed by a charge of a larger sum, as 8,000*l.*, and the excess only will be void: *Parker* v. *Parker*, Gilb. Eq. Rep. 168, cited Sugd. Pow. 521.

Time.

A mistake on the part of an appointor as to the time when the appointment is to take effect, will not render the appointment void: *Probert* v. *Morgan*, 1 Atk. at p. 441.

Power of sale.

A power to appoint an estate authorizes a gift to trustees to sell the estate, and an appointment of the proceeds of such sale: *Kenworthy* v. *Bate*, 6 Ves. 793. See also *Fowler* v. *Cohn*, 21 Beav. 360. So also a power to appoint estates to be purchased with money produced by the sale of other estates, was held to be well executed by an appointment operating directly on the original estates: *Bullock* v. *Fladgate*, 1 V. & B. 471.

Less estate may be given under power to appoint the fee.

Although an interest cannot be appointed different from that expressly authorized by the power, *e. g.*, a leasehold interest, where the power is to appoint for a freehold interest, still a power to appoint the fee will authorize the gift of an estate for life; *Bovey* v. *Smith*, 1 Vern. 84; or of an estate tail; *Phelp* v. *Hay*, reported Sugd. Pow. (App.) 928; the nature of the interest being the same; and such a power, provided

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the giving a less estate is not prohibited, will authorize any legal limitations within the scope of the power which may be secured out of the fee: *Crozier* v. *Crozier*, 3 Dru. & W. 353. The same rule applies to chattel interests (*k*).

The provision of the Wills Act (7 Will. 4 & 1 Vict. c. 26), sect. 28, that a devise of land without words of limitation will pass to the devisee the fee simple, or other the whole estate or interest of the testator, unless a contrary intention appears by the will, applies to gifts under powers created by will. And even before the Act it was held, in a carefully considered case, that when the intention is clear, a power created by will, not containing any words of inheritance, may enable the donee to appoint the fee: *Liefe* v. *Saltingstone*, 1 Mod. 189. See *Tomlinson* v. *Dighton*, 1 P. Wms. 149. See also the case of *R.* v. *Marquis of Stafford*, 7 East, 521, where a devise to A. for life, with remainder to the lawful issue of her body in such parts, shares and proportions, manner and form, as she should appoint, was held to authorize an appointment to the children in fee.

In *Leonard Lovies's case*, 10 Rep. 78, the uses of a feoffment of certain manors by indentures of even date, declared to be to the use of the feoffor for his life, and afterwards to the use of such tenants as he should demise any part of the premises to for life or for years, &c., and afterwards to the use of the performance of his will, and to the use of such person and persons to whom by his will he should devise any estate or estates in the premises; it was held that he might devise estates in fee or in tail. And in *Kenworthy* v. *Bate*, 6 Ves. 793, where an estate was limited by deed to the use of such child or children of A. as he should appoint, it was held that an appointment in fee simple was authorized by the power. See also *Doe* d. *Chadwick* v. *Jackson*, 1 Mood. & R. 553, and the remarks thereon of Lord *St. Leonards*, Sugd. Pow. 403, 437. It has been held

(*k*) See on this point, and generally as to the execution of powers of leasing, *post*, tit. LEASES.

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that an unlimited power to charge land authorizes a disposition of the land in trust for sale, and an appointment of the proceeds of sale: *Long* v. *Long*, 5 Ves. 445. And conversely, a power to appoint lands will be well executed by an appointment to an object of the power of a gross sum charged on the land: *Roberts* v. *Dixall*, 2 Eq. Ca. Abr. 668, pl. 19. See also *Palmer* v. *Wheeler*, 2 Ball & Beat. 18; *Trollope* v. *Linton*, 1 Sim. & St. 477.

FRAUD ON POWER.

Frauds on Powers.]—In some cases it may be necessary for the draftsman to consider whether a proposed appointment will not be a fraud on a power. It is a well-established principle that the donee of a power must execute it in good faith for the purposes of the power, and for the benefit of the objects of the power, otherwise the appointment will be liable to be set aside as fraudulent and void. And this will be the case whether or not there is an arrangement with the appointee, or whether the appointor contemplates a benefit to himself, or whether he is endeavouring to carry out the real intention of the appointor not expressed in the power.

Arrangement with appointee.

It has been repeatedly held that an appointment to an object of a power, upon a secret understanding that the appointee shall make a disposition for the benefit of the appointor, or of a stranger, is void as being a fraud upon the power: *Daubeny* v. *Cockburn*, 1 Mer. 626, and numerous other cases cited *infra*. But it is not necessary, in order to give the Court jurisdiction to set aside an appointment on the ground of fraud, that the appointee should be aware of the intention of the donee to evade the terms of the power: *Wellesley* v. *Mornington*, 2 K. & J. 143. So in *Re Marsden's Trusts*, 4 Drew. 594, the donee of a power over a fund, the income of which she received for life, by deed appointed the whole fund to a child an object of the power, subject to her own life interest, with the intention, *which was not communicated to the appointee until after the donee's death*, that the appointee should thereout make a provision for the benefit of the donee's husband, the

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father of the appointee, it was held that the appointment was absolutely void.

Jointure.

Aleyn v. *Belchier.*

The leading case on the subject of frauds on powers is *Aleyn* v. *Belchier*, 1 Eden, 132; in that case a power of jointuring was executed in favour of the donee's wife, but with an agreement that the wife should receive only a part as an annuity for her own benefit, and that the residue should be applied in payment of the donee's debts; it was held that the appointment was void, except as regards the annuity. Lord Keeper *Henley* said: "No point is better established than that a person having a power must execute it *bonâ fide* for the end designed, otherwise it is corrupt and void. The power here was intended for a jointure, and not to pay the husband's debts." And see *Duke of Portland* v. *Topham*, 11 H. L. Ca. 32, *infra*. In *Lane* v. *Page*, Amb. 233, a husband executed a power of jointuring in favour of his wife, on an understanding that she should apply part of the jointure for her own benefit, and the remainder in discharge of the appointor's debts, and subject thereto, to herself for life; it was held that the appointment was fraudulent, but ought nevertheless to be upheld to the extent of the part appointed unconditionally for the wife's benefit. Lord *Hardwicke* said: "Fraud will affect only so far as it extends; and this Court will not say that *participes criminis* shall have no benefit in any part." And his lordship seems to have thought that this principle would extend to appointments under powers of appointing portions.

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Portions.

But in the case of *Daubeny* v. *Cockburn*, 1 Mer. 626, personalty was settled in trust for such one or more of his children as A. should appoint: A. appointed to one child exclusively, upon a secret understanding that the child should reassign a part of the fund to a stranger; it was held that the appointment was void *in toto*. So in *Salmon* v. *Gibbs*, 3 De G. & Sm. 343, the donee of a power to appoint among her children, to whom the fund was limited in default of appointment, having only two daughters, appointed nearly the whole of the fund to one of them, who was unmarried, on the understanding, but without

Salmon v. *Gibbs.*

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any positive agreement, that the appointee would resettle one moiety on trusts for the separate use of the other daughter, who was married, and after her death, on trusts for her children. A resettlement was accordingly made, without the privity of the married daughter, who did not hear of the transaction until several years afterwards; it was held by *Knight Bruce*, V.-C., on the suit of the husband, that the appointment was invalid. See also *Carew* v. *Richards*, 1 De G., F. & J. 548; *Agassiz* v. *Squire*, 18 Beav. 431; *S. C.*, 23 L. J., N. S. 985; *Birley* v. *Birley*, 25 Beav. 299.

Where the benefit of the appointor is contemplated.

This principle will apply *a fortiori* where the object of the appointor in making the appointment, or the understanding upon which the appointment is made, contemplates the benefit of the appointor. In *Lord Hinchinbroke* v. *Seymour*, 1 Bro. C. C. 395, the donee of a power to charge portions at such times as he should direct, exercised the power by appointing a portion to a daughter aged fourteen years; she shortly afterwards died, and the father claimed the portion as her administrator; it was held that the appointment could not be upheld. See also *Keily* v. *Keily*, 4 Drew. & W. 38; *Beere* v. *Hoffmister*, 23 Beav. 101. So, where the appointee has agreed that the fund appointed shall be transferred to the appointor, in exchange for other property; *Askham* v. *Barker*, 12 Beav. 499; or where the appointee has agreed to pay the appointor's debts; *Farmer* v. *Martin*, 2 Sim. 502; *Palmer* v. *Wheeler*, 2 Ball & Be. 18; or where the appointment was made in payment of a debt due to the appointee by the appointor: *Reid* v. *Reid*, 25 Beav. 469. See also *Beddoes* v. *Pugh*, 26 Beav. 407; *Jackson* v. *Jackson*, 7 Cl. & Fin. 977. And in *Arnold* v. *Hardwick*, 7 Sim. 343, Sir L. *Shadwell*, V.-C., held that where the donee of a power appointed the fund to one of the objects of the power, under an understanding that the latter should lend the fund to the former, although on good security, the appointment was bad. See, however, *Roach* v. *Trood*, 3 Ch. D. 429, where the Court of Appeal upheld an absolute appointment in favour of a son, who was an object of the power, the effect

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of which in connection with other transactions was to benefit not only the object, but also other persons including the appointor himself; the circumstances of this case, were distinguished in the judgment of the Court from those in *Re Marsden's Trusts*, *ubi supra*, and other cases in which appointments have been set aside on the ground of fraudulent or corrupt intention.

Where a tenant for life with power to appoint portions for younger children exercised the power in favour of his daughters then of very tender age, directing the portions to vest immediately, but to be payable subject to his life interest at twenty-one years or marriage, it was held by the Court of Appeal (reversing the decision of *Kay*, J., reported 19 Ch. D. 492), that the fact that upon the death of one of the daughters the appointor took her share as next of kin was not sufficient to invalidate the appointment as being a fraud on the power: *Henty* v. *Wrey*, 21 Ch. D. 332. See also *Shirley* v. *Fisher*, 47 L. T. 109.

The general rule laid down in *Daubeny* v. *Cockburn*, 1 Mer. 626, that an appointment made partly with a fraudulent intention is wholly vitiated by the fraud, has in some cases been held not to apply where the proper part of the appointment can be distinguished from the improper part: *Carver* v. *Richards*, 1 De G., F. & J. 548. See also *Ranking* v. *Barnes*, 12 W. R. 565; *Sadler* v. *Pratt*, 5 Sim. 632.

Arrangement for benefit of all objects.

Moreover, where a family arrangement is proposed to be carried out for the benefit of *all* the objects of the power, they are at liberty to contract with each other to give to the appointor some advantage which he otherwise could not have had, without invalidating the appointment. See *Davis* v. *Uphill*, 1 Swanst. 129; *Wright* v. *Goff*, 22 Beav. 207; *Rhodes* v. *Cook*, 2 Sim. & St. 488; *Skelton* v. *Flanagan*, 1 Ir. Eq. R. 362. See also *Re Huish's Charity*, L. R., 10 Eq. 5; *Cooper* v. *Cooper*, L. R., 5 Ch. 203; *Roach* v. *Trood*, 3 Ch. D. 429.

Appointment and contemporaneous settlement.

An appointment to an object of the power, and a contemporaneous settlement of the fund by the appointee, is valid even though the appointor may

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be aware that the settlement will contain limitations in favour of persons not objects of the power: *Thompson* v. *Simpson*, 1 Dr. & W. at p. 487. But the appointment must not be in pursuance of an agreement or understanding that the fund shall be settled: *Pryor* v. *Pryor*, 2 De G., J. & S. 205; *Birley* v. *Birley*, 25 Beav. 299.

Lee v. *Fernie.*

The rule as to setting aside fraudulent appointments extends, not only to cases where the appointor and appointee stand to each other in the relation of husband and wife or parent and child, but to all cases; and applies even to cases where the power was created by a voluntary settlement of the appointor himself. So, in *Lee* v. *Fernie*, 1 Beav. 483, where a person desirous of benefiting the descendants of A. by a voluntary settlement, reserved to himself the power of appointing amongst certain persons named, being the only descendants of A. of whose existence he was then aware; he afterwards discovered the existence of other descendants of A., and to remedy the omission to provide for them he appointed a part of the fund to an object of the power upon his executing bonds to pay over the amount to the persons newly discovered. Lord *Langdale*, M. R., said: "It certainly seems a hard thing that he, the author of this gift, and owner of the property could not do this; but he had declared a trust; he had said that the property should belong to certain persons, that the power he had reserved should be exercised for the benefit of certain persons only; and I quite agree with those who advised him that it was not competent for him, of his own authority, to alter the destination of his property."

Topham v. *Duke of Portland.*

An important illustration of the principle now under discussion is afforded by the leading case of *Topham* v. *Duke of Portland*, which repeatedly came before the Courts in consequence of successive attempts by the donee of a power to execute it with the indirect object, not of benefiting either himself or other persons strangers to the power, but of carrying out certain wishes of the settlor, communicated to the appointor, but not expressed in the instrument

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creating the power. The facts were shortly as follows: In 1843 the then Duke of Portland, by a voluntary deed of settlement, declared that the trustees should hold certain funds upon trust for the benefit of his two daughters, Lady Harriet Bentinck and Lady Mary Bentinck, in such proportions, subject to such limitations, restrictions, &c. as the Duke of Portland for the time being should appoint, and in default of appointment upon trust to pay the income to the daughters equally during their joint lives, with remainder over. At the time of the execution of the settlement a marriage was contemplated between Lady Mary and Colonel (afterwards Sir William) Topham, to which the Duke strongly objected, and the real object of the settlement was that in the event of the marriage the donee might have power to deal with the moiety of the trust fund which otherwise would have passed to Lady Mary without control. In 1854 the settlor died, and was succeeded by his son, and shortly afterwards the marriage took place. The son, the donee of the power, accordingly appointed the whole of the fund to Lady Harriet for her life, reserving a power of revocation; it appears that Lady Harriet was not informed of this appointment, and the intention was that Lady Harriet should in fact only receive one moiety of the income, and that the other moiety should be accumulated, or held in suspense, to be dealt with thereafter according to circumstances. A suit was instituted in 1860 to set aside this appointment, and also certain other transactions, as being frauds on the power in execution of which they purported to be made. *Romilly*, M. R., dismissed the bill so far as relates to the appointment now under consideration; see 31 Beav. 525; but on appeal this decision was reversed, see 1 De G., J. & S. 517, and the appointment was declared to be void; and the order of the Lords Justices was on the 7th April, 1864, affirmed by the House of Lords, with the variation "that the declaration was to be without prejudice to any question as to any future exercise of the powers of appointment." Lord *Westbury* said (11 H. L. Ca. at p. 54): "The settled principles of the

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law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power), which he may desire to effect in the exercise of the power." And Lord *St. Leonards* said: "A party having a power like this must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself directly or indirectly. It may be subject to limitations and directions, but it must be a pure, straightforward, honest dedication of the property, as property, to the person to whom he affects, or attempts, to give it in that character . . . . . The parties have shown that this was not a real transaction, as such appointments must be in order to be valid, but that it was a transaction founded upon an intention to give one-half absolutely and no more to Lady Harriet, and to make her the instrument of tying up the other half for Lady Mary, so that they might give it to her or not, just as they thought proper afterwards. There is that account with the bankers marked 'S,' which is admitted to mean 'sister's,' and which we know means Lady Mary, and it was partially carried to that account. Upon the whole, therefore, this is a case in which it cannot for a moment be contended that the appointment is good. If not good for the moiety, which it is not, then it cannot be good for the other part; for the other part is given to the appointee who is to execute that purpose which, of itself, destroys the whole appointment."

The son then executed another deed, appointing the income of the fund absolutely to Lady Harriet, during the joint lives of herself and her sister. Lady Harriet was informed of this appointment;

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one moiety was carried as it became payable to an account "Lady Harriet Bentinck—separate account," and the other was applied by her to her own use. She and the appointor deposed that there was no agreement between them as to the disposal of the former moiety of this income.

The Court of Appeal held (affirming the decision of *James*, V.-C.), that the second appointment was void: "Any attempt to exceed the limitations of the power, through the medium of any appointment to one of the objects of it in exclusion of the other, is equally invalid, whether the purpose of the donee be selfish, or, as he supposes, a more beneficial mode of effecting that which he takes the donor of the power to have desired. The Court will not allow him to interpret the donor's intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power; and a literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power." Per Lord *Hatherley*, C., L. R., 5 Ch. at p. 59.

Purchaser with notice of fraud.

It may be here remarked in passing, though the subject does not fall within the scope of this dissertation, that a fraudulent appointment will be set aside against a purchaser for valuable consideration if he has notice of the fraud; *Palmer* v. *Wheeler*, 2 Ball & Be. 18; or even without notice if he is not protected by having acquired the legal estate; *Daubeny* v. *Cockburn*, 1 Mer. at p. 638; but where the legal estate has passed there must be evidence of actual notice of the fraud to set aside the sale: *M'Queen* v. *Farquahar*, 11 Ves. 467. A fraudulent appointment to a child will be set aside though made in consideration of that child's marriage, and the issue cannot protect themselves on the grounds that they are purchasers for valuable consideration: *Conolly* v. *M'Dermott*, cited Sugd. Pow. 617. But see *Cooper* v. *Cooper*, L. R., 5 Ch. 203, where an appointment to a child, to be held upon the trusts of her marriage settlement, including an ultimate trust for the appointor, was upheld, where there had been a considerable lapse of time and subsequent dealings with the trust funds.

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Where there is no evidence of fraud an appointment will not be set aside on the ground of feeling, anger, or resentment, or any other reason, however capricious: *Vane* v. *Lord Dungannon*, 2 Sch. & L. at p. 130. See also *Supple* v. *Lawson*, Ambl. 729; and *Topham* v. *Duke of Portland*, L. R., 5 Ch. at p. 57.

Burden of proof.

The burden of proving fraud is on the party who seeks to impugn the appointment; and the fraud must be clearly established, mere suspicion is not sufficient: *M'Queen* v. *Farquahar*, 11 Ves. 467; see also *Campbell* v. *Home*, 1 Y. & C. C. C. 664; *Pares* v. *Pares*, 33 L. J., Ch. 215.

See further, as to frauds on powers, Sugd. Pow. 603; Farwell Pow. 325; and the notes to *Aleyne* v. *Belcher*, in 1 Wh. & Tud. L. C. Eq. 415.

Succession duty on appointments.

The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), sect. 4, enacts as follows:—

"When any person shall have a *general* power of appointment, under any disposition of property, taking effect from the death of any person dying after the time appointed for the commencement of this Act,* over property, he shall, in the event of his making an appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a *succession derived from the donor of the power;* and where any person shall have a *limited* power of appointment, under a disposition taking effect, upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a *succession derived from the person creating the power as predecessor.*"

*1 August, 1853.

It has, however, been decided that for purposes of assessing the succession duty, in the case of an appointment under a power created after the Act, the appointee takes a succession from the donee of the power. A testator devised to his widow a life estate in real property, and gave her a general power of appointment by deed or will: she appointed the lands by deed to the use that trustees should during the lives of the wife and children of the testator's nephew receive an annuity for the benefit of the wife for her separate use: it was held that the nephew's wife took the annuity as a succession,

Stamps. not from the testator himself, but his widow, and that a duty of 10*l.* per cent. was payable: *Attorney-General* v. *Upton*, L. R., 1 Ex. 224. Otherwise, if the power was created by an instrument dated before the Act: *Re Barker*, 7 H. & N. 109. See also *Attorney-General* v. *Charlton*, 4 App. Ca. 427; *Attorney-General* v. *Brackenbury*, 32 L. J., Ex. 108. As to duty being payable where the donee of the power is domiciled abroad, see *Re Lovelace*, 4 De G. & J. 340.

Stamps. An appointment made by deed in exercise of a power, not being a conveyance by way of sale or mortgage, is liable to a stamp of ten shillings.

PRECEDENTS.

I. *APPOINTMENT in Fee of Part of the Estates included in a Power, subject to the Estates for Life of the Appointor, and his Wife.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*appointor*], of &c., sends greeting. WHEREAS under or by virtue of the will of [*testator*], of &c., deceased, dated the ——— day of ———, 18—, and proved on the ——— day of ———, 18—, in the Principal Registry of the Probate Division of her Majesty's High Court of Justice, the messuage and hereditaments, hereinafter described and expressed to be hereby appointed, stand limited to the use of the said [*appointor*] and of [*wife*] his wife, successively during their respective lives, with remainder to such uses as the said [*appointor*] shall by deed or will appoint, with remainders over as in the said will is mentioned. NOW THESE PRESENTS WITNESS, that the said [*appointor*], in exercise of the power reserved to him by the said will, and of all other powers enabling him in this behalf, hereby appoints that ALL THAT messuage, &c., situate, &c., being part of the hereditaments by the said will subjected to the appointment of the said [*appointor*], with their appurtenances, shall henceforth go, remain, and be TO THE USE of the said [*appointee*], his heirs and assigns; Subject nevertheless

Recital of will creating the power (*a*)

Testatum.

Appointment in pursuance of a power.

Parcels.

To the use of appointee in fee (*b*).

(*a*) Where a deed of appointment conveys an estate in fee or any lesser estate in land, or otherwise affects the title to land, the instrument creating the power, and other subsequent circumstances affecting the property should be recited, so as hereafter to render the appointment capable of being conveniently made a root of title. In other cases appointments may sometimes be made by indorsement or by supplemental deed, as to which see *post*, p. 778, note (*d*). Rentals.

(*b*) An appointment is merely a right to limit a use. The appointment must, therefore, be made to the use of the person intended to take directly, and without the interposition of a grantee to uses, otherwise the grantee will take the first use under the original estate, and thus the legal estate will vest in him. See Sugd. Pow. 190. Appointment a limitation of a use.

I. In Fee, Subject to Estates for Life.

and without prejudice to the several estates for life of the said [*appointor*], and [*wife*], his wife respectively, in the hereditaments and premises hereby appointed.

In witness, &c.

II. *APPOINTMENT by a Father and Eldest Son, where Lands were limited to such Uses as they should jointly appoint, with Remainders over; that, in case of the Eldest Son's Death, and a Failure of his Issue Male in the Father's Lifetime, the Lands shall (subject to any joint Appointment made or to be made by them) be, from that Son's Death and Failure of his Issue Male,* To such uses *as the Father and his second Son (surviving the Eldest Son) shall* appoint (*c*).

Exordium.

TO ALL TO WHOM these presents shall come, The Most Noble G., Marquis of P. and Earl of B., &c., and the Right Honourable C. K., commonly called Earl of B., eldest son of the said Marquis of P., send greeting. Whereas by virtue of an indenture dated the ——— day of ———, and expressed to be made between the said G., Marquis of

Recital of settlement whereby lands were limited;

A person having a power to appoint to uses may appoint to such uses as another person shall appoint, which uses will take effect out of the original seisin.

(*c*) On a point similar to the above, Lord *St. Leonards* observes: "In a preceding page I put the case of an estate being conveyed to such uses as A. shall appoint, and of his desire to convey the estate as B. shall appoint. Perhaps there is no conveyancer to whom, in the early part of his professional life, a doubt has not presented itself in regard to the validity of such an appointment. Two objections have been made to it, which have come within my observation: the one, that it is contrary to a known principle, that a power cannot be delegated; and the other, that it is a new attempt at a perpetuity. But these objections are easily answered. As to the first, the rule that a power cannot be delegated, is not a general inflexible rule, but is simply a regulation, that a *confidence* reposed in one, cannot by him be delegated to another. This rule, therefore, is inapplicable to the case before us; for no *confidence* was reposed in A., but the estate was, merely for his own convenience, conveyed to such uses generally as he should appoint. In regard to the second objection, the limitation has no greater tendency to a perpetuity than a simple conveyance in fee. Under the power in question the donee may tie up the estate for exactly the same period, but not longer, than he could were he seised in fee:" Sugd. Pow. 195.

II. To such Uses as Others shall Appoint.

P., of the first part, the said Earl of B., of the second part; and [*trustees*], of the third part; All those, &c. [*parcels*], were (subject to certain charges mentioned in the same indenture), conveyed and assured To the use of the said G., Marquis of P., for life; with remainder to such uses as they the said Marquis of P., and Earl of B., during their joint lives should by deed from time to time jointly appoint: And in default of such appointment To the use of the said Earl of B. for his life, with remainder to the use of his first and other sons successively in tail male; with remainder To the use of the Honourable F. K., commonly called Lord F. K., younger son of said Marquis of P., for his life, with remainder to the use of his first and other sons successively in tail male, [&c.]; with remainder To the use of the said Marquis of P. in fee-simple: AND WHEREAS the said Marquis of P. has requested the said Earl of B. to join in appointing the said manor, hereditaments, and premises comprised in the said indenture for the purposes and in manner hereinafter appearing, whereto the said Earl of B. has consented. NOW THESE PRESENTS WITNESS, that in pursuance of the said agreement, and for effectuating the purposes aforesaid, The said Marquis of P. and Earl of B., in exercise of the power reserved to them in the said indenture as hereinbefore mentioned, and by virtue of all other powers enabling them in this behalf, do, and each of them does, hereby appoint, That in case the said Earl of B. should die during the lifetime of the said Marquis of P. without issue male, or leaving issue male, and such issue should fail during such lifetime, ALL and singular the manor or lordship, advowsons, messuages, lands, hereditaments, and premises comprised in the said indenture, shall (subject to any appointment or appointments which has or have been, or may hereafter be made thereof, or of any part thereof, by the said Marquis of P. and Earl of B. in exercise of the power to them for that purpose given by the said indenture), go, remain and be, To THE USE of such person and persons, and for such estate and estates, or for such intents and purposes, and with, under, and subject to such powers, provisoes, limitations, and conditions, and charged and chargeable with such sum and sums of money, either annual or in gross, as the said Marquis of P. and Lord F. K. (in case they shall survive the said Earl of B.), shall from time to time, by deed jointly appoint; And that in default of, and until such

To the use of the father for life;

remainder to such uses as father and son should jointly appoint; with remainder over.

and in default, to the use of the son in tail male;

remainder to the use of his brother in tail male;

remainder to the use of the father in fee.

Recital of father's request that son would join in appointing the lands.

Testatum.

Appointment of father and son,

that in case of son's death, and a failure of his issue male in father's lifetime,

parcels shall (subject to any joint appointment) be,

from son's death, and failure of his issue male,

to such uses as father and second surviving son shall by deed appoint:

and in default

II. To such Uses as Others shall Appoint.

of such appointment,

to the uses declared in the bargain and sale.

appointment, and in case any such should be made, when and as the estates thereby to be limited shall respectively end and determine, and as to such parts of the said premises of which there shall be no such appointment, To such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, as are expressed and declared of and concerning the said manor, hereditaments and premises, in and by the said indenture.

In witness, &c.

III. *APPOINTMENT of a* Jointure *under a Power contained in a Strict Settlement (by Supplemental Deed) (d).*

THIS DEED made the ——— day of ———, 18—, By [*appointor*], of &c., in the county of ——— esquire, and

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Annexes and supplemental deeds.

(*d*) By the Conveyancing Act, 1881, s. 53, it is enacted that, "(1) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof. (2) This section applies to deeds executed either before or after the commencement of this Act." An appointment of a jointure or portion charged on or raisable out of real estate or of a reversionary share in trust funds comprised in the settlement creating the power are in effect directions to the trustees of the settlement to apply the yearly or other sum appointed for the purposes mentioned in the appointment. The deed of appointment will, therefore, in such cases, properly be retained in the custody of the same persons as hold the original settlement, and accordingly may be made by indorsement on, or by deed supplemental to the settlement. When practicable, the most convenient form of the appointment will be by indorsement (or where the original deed is in the modern "book" form by an annex actually attached thereto after execution), inasmuch as the principal deed is thereby necessarily always available for purposes of reference. The principal advantages of an annex or supplemental deed appears to be that it may be forwarded to parties at a distance for execution, without the principal deed. On the other hand, an annex or supplemental deed is liable to come into the possession of persons who do not hold the principal deed on which it depends, and a reference to which may be necessary to render it intelligible. It therefore seems, generally

III. Of Jointure.

supplemental [*or* to be read as an annex] to an indenture of settlement dated the ——— day of ———, 18—, and expressed to be made between [*parties*]: WITNESSETH that in consideration of the marriage lately solemnized between the said [*appointor*] and [*wife*] his wife, the said [*appointor*] in exercise of the power reserved to him by the said indenture, and of every other power in anywise enabling him in this behalf, hereby (subject and without prejudice to the estate by the said indenture limited to the said [*father*] for life, and to the raising and payment of the said sums of £——— and £———, and the interest thereon respectively, or otherwise subject as in the same indenture is mentioned), grants and appoints unto the said [*wife*] during her life, in case she should survive him the said [*appointor*], the annual sum or yearly rent-charge of £——— to be issuing out of, and charged upon all and singular the manors and hereditaments comprised in the said indenture, such rent-charge to be for the jointure of the said [*wife*], and in bar of all dower, and freebench, and to be paid to the said [*wife*], by equal half-yearly payments on the ——— day of ———, and the ——— day of ———, in every year, without any deduction; the first half-yearly payment thereof to be made on such of the said days as shall first happen after the decease of the said [*appointor*]. PROVIDED ALWAYS (*e*), that nothing herein contained shall prevent the said [*appointor*], from granting and appointing any further rent-charge or rent-charges to the said [*wife*] under the power of jointuring for that purpose reserved by the said indenture or any other such power as aforesaid.

Appointment by husband (subject to his father's life estate, and to the raising of several sums of money),

unto his wife, in case she should survive him, of a yearly rent-charge, payable out of manors, &c. comprised in settlement.

such rent-charge to be for her jointure, and in bar of dower.

This appointment not to prevent any further appointment.

IN WITNESS, &c.

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speaking, advisable that where the principal instrument and the consequent instrument are likely to fall into different hands, the latter should be by an independent deed, reciting the power, and all subsequent transactions affecting the property. Of course, when the power is created by will a recital of or reference to the will must be contained in the deed of appointment.

(*e*) Whenever the husband does not exercise his power to the full extent, it is prudent to add a similar proviso to the above.

IV. *APPOINTMENT by a Father of a* PORTION *to a Daughter on her Marriage, under a Power contained in a Strict Settlement of the Family Estates (by Supplemental Deed) (g).*

THIS DEED made the ——— day of ———, 18—, BY [*appointor*], of ——— in the county of ———, esquire, and to be read as an annex [*or* supplemental] to an indenture of settlement, dated &c., and expressed to be made between &c. [*parties*]. WHEREAS there have been issue (other than an eldest son) of the said [*appointor*], by [*wife*] his wife, three sons and two daughters, that is to say, A. F., who attained the age of twenty-one years, and is since deceased, B. F., who died an infant, C. F. [*former appointee*], who has attained the age of twenty-one years, and is now the wife of M. N., D. F. [*present appointee*], who has attained the age of twenty-one years, and E. F., now an infant of the age of ——— years, or thereabouts: AND WHEREAS by a deed-poll under the hand and seal of the said [*appointor*], dated &c., and thereby directed to be read as an annex to the said indenture of settlement, the said [*appointor*], in pursuance of the power reserved to him by the same indenture, appointed the sum of £———, part of the sum of £———, thereby authorized to be raised for the portions of his daughters and younger sons (if three or more), as therein is mentioned, unto the said [*former appointee, married name*], then [*maiden name*], as her portion, in case her then intended marriage with the said [*her husband*] should take effect: And directed the same to be raised and paid immediately upon the solemnization thereof, which shortly afterwards took place, and the said sum of £——— was accordingly afterwards raised by a mortgage of part of the estates comprised in the said settlement, and paid by the direction of the said [*former appointee*] and [*her husband*], to [*trustee*] and [*trustee*] as the trustees of her marriage settlement: AND WHEREAS a marriage is intended to be shortly solemnized between the said [*appointee*] and [*intended husband*], of &c.: AND WHEREAS the said [*appointor*], is desirous of appointing the sum of £——— further part of the said sum of £——— so authorized to be raised as aforesaid, unto the said [*present appointee*], to be paid immediately upon the solemnization of the said intended

Recitals of state of family;

of previous appointment of a portion;

intended marriage of appointee.

(*g*) See *ante*, p. 778, note (*d*).

IV. Of Portion.

marriage in manner hereinafter appearing. NOW THESE PRESENTS WITNESS that in consideration of the said intended marriage, and in exercise of the power reserved to him by the said indenture of settlement, and of all other powers (if any) enabling him in that behalf, He the said [*appointor*], hereby appoints the sum of £———, further part of the said sum of £———, by the same indenture of settlement authorized to be raised for the portions of his daughters and younger sons, (if three or more,) as aforesaid, unto the said [*appointee*], as and for her marriage portion or fortune, in case the said intended marriage shall take place; AND the said [*appointor*], hereby authorises and directs [*trustee*], the surviving trustee of the said term of two hundred years, created by the said indenture of settlement, forthwith, or as soon as may be after the solemnization of the said intended marriage, to raise the said sum of £——— hereby appointed, by a mortgage of a competent part of the estates comprised in the said indenture of settlement, and to pay the same to the person or persons who shall be entitled thereto, by virtue of the appointment hereby made. PROVIDED ALWAYS, and the said [*appointor*], declares that the appointment hereby made is not intended by him to prevent him from hereafter appointing any part or share of the residue of the said sum of £——— to her the said [*appointee*], in case he should think proper so to do, or to prevent her from hereafter having or taking under and by virtue of the trusts of the said settlement (*h*) any part or share of the residue of the said sum of £———, in case he the said [*appointor*] should not hereafter make any appointment of or concerning the same, or from having or taking (*i*) any part or share of so much of the said residue as shall or may ultimately remain unappointed by him

Testatum.

Appointment of the portion, in case the marriage should take effect.

Authority to the surviving trustee of the term, to raise the portion by mortgage forthwith.

Proviso, that appointment is not to prevent a further appointment to appointee, &c.

(*h*) If the sum appointed be larger than the appointee's distributive share would have been, in case there had been no appointment, say 2,000*l.*, there being, for instance, 3,000*l.* and three objects, one of them not having gained a vested interest in her share in default of appointment; then, provided it be the intention of the appointor, add,

LARGER APPOINTMENT THAN A DISTRIBUTIVE SHARE, WHERE THERE IS AN INFANT.

"in the event of the death of her sister, the aforesaid [*infant*], without having acquired a vested interest therein, any part," &c., *ut supra*.

(*i*) "in the same event, any part," &c., *ut supra*.

IV. Of Portion.

the said [*appointor*]: Save only and except that the said [*appointee*] shall not in (*k*) any event hereafter, unless by the appointment of the said [*appointor*], have or take any further or greater part of the said residue of the said sum of £———, than will, with the said sum of £——— hereby appointed to her as aforesaid, make up what would (*l*) have been the full part or share of her the said [*appointee*] under and by virtue of the trusts of the said settlement of and in the said sum of £———, in case he the said [*appointor*] had not made any appointment whatsoever of or concerning the same, or any part thereof (*m*). PROVIDED ALSO that the appointment hereby expressed to be made shall be void, if the said intended marriage shall not take place within twelve calendar months from the date of these presents.

Hotchpot clause.

Proviso.

IN WITNESS, &c.

V. *APPOINTMENT to a Daughter on her Marriage of a* SHARE *of* TRUST FUNDS *under a Power contained in a Will.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME [*appointor*], of &c., sends greeting. WHEREAS [*testator*], of &c., deceased, duly made and executed his will, and thereby,

Recitals of will creating the power;

(*k*) "such event, except by," *ut supra.*

(*l*) "in the same event have been," &c., *ut supra.*

LARGER APPOINTMENT THAN DISTRIBUTIVE SHARE.

(*m*) The hotchpot clause will not be necessary if a similar clause is contained in the instrument creating the power. If the appointment be larger than the distributive share in default of appointment, and there is an infant, provided it be the intention, add,

In case infant acquires a vested interest, appointee not to take any share of the residue in default of appointment.

"But in the event of the said [*infant's*] living to acquire a vested interest in the said residue of the said sum of £——, subject to her said father's power of appointment, the said [*appointee*] is not to have or take any part or share of the said residue, in case the said [*father*] should not make any appointment of or concerning the same, or to have or take any part or share of so much of the said residue as shall or may ultimately remain unappointed by him."

V. Of Share of Trust-Funds to One.

after bequeathing certain specific and pecuniary legacies therein mentioned, gave and bequeathed the residue of his personal estate to [*trustees*] in trust for the said [*appointor*] during his life, and from and after his decease in trust for the child or children of the said [*appointor*] as he should by deed or will appoint, and in default of such appointment upon the trusts therein mentioned or referred to, and the said [*testator*] by his said will appointed the said [*trustees*] the executors thereof: AND WHEREAS the said [*testator*] died on the ——— day of ———, 18—, and his said will was duly proved on the ——— day of ———, 18—, by the said executors in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice: AND WHEREAS the residuary personal estate of the said [*testator*] is now represented by the several stocks, funds, and securities specified in the schedule hereunder written: AND WHEREAS there have been four children of the said [*appointor*], all of whom are now living, but one only namely, [*appointee*] has attained the age of twenty-one years: AND WHEREAS a marriage is intended shortly to be solemnized between the said [*appointee*] and [*intended husband*]: NOW THESE PRESENTS WITNESS that the said [*appointor*] in exercise of the power given to him by the said will, and of every other power enabling him in this behalf, hereby appoints that one equal fourth part or share of and in the said stocks, funds, shares, and securities specified in the said schedule, and of and in all other, if any, the residuary personal estate of the said [*testator*], and of and in the stocks, funds, shares, or securities, for the time being representing such fourth part, or shall from and after the death of the said [*appointor*] remain and be held in trust for the said [*appointee*]. PROVIDED ALWAYS that the appointment hereby expressed to be made shall be void if the said intended marriage shall not take place within twelve calendar months from the date of these presents.

of death of testator;

of probate of his will;

of state of family;

of intended marriage of appointee.

Testatum.

Appointment of share.

Proviso.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

VI. *APPOINTMENT by a Father and Mother of* STOCK *amongst their* CHILDREN EQUALLY, *subject to their own Life Interests therein; with* PROVISOES *as to Survivorship with regard to Shares appointed to two Infant Daughters (by Indorsement); and a* POWER *of* REVOCATION.

Exordium. TO ALL TO WHOM THESE PRESENTS SHALL COME, the within-named [*father*] and [*mother*], in the within written indenture called [*mother's maiden name*], send greeting.

Recital of appointor's marriage; WHEREAS shortly after the date of the within written indenture, the then intended marriage between the said [*father*] and [*mother*], his wife, was duly solemnized:

of state of family; AND WHEREAS there is issue of the said marriage, now living, two sons, namely, A. B. and C. B., and five daughters, namely, E. Y., the wife of, &c., F. B., G. B., H. B., and I. B.; and all the said children, except the said H. B. and I. B., have attained the age of twenty-one years:

of state of trust-fund. AND WHEREAS the trust funds now subject to the trusts of the said indenture of settlement are represented by the sum of £———, 3*l.* per cent. Consolidated Bank Annuities, standing in the names of [*trustees*] the present trustees of the same indenture:

Testatum. NOW THESE PRESENTS WITNESS, that in exercise of the power to them for this purpose reserved by the said indenture of settlement, and of all other powers enabling them in this behalf, they the said [*father*] and [*mother*] hereby jointly appoint,

Appointment by a father and mother, that after the death of the survivor, trust-fund shall be in trust for their children equally. that from and immediately after the decease of the survivor of them, the said [*father*] and [*mother*], his wife, the said sum of £———, 3*l.* per cent. Consolidated Bank Annuities, and the interest and dividends thereof, shall remain and be IN TRUST for the said A. B., C. B., E. Y., F. B., G. B., H. B., and I. B. respectively, in equal shares.

Proviso, that if either of the two infant daughters should die under 21, without having been married, her share shall go to the other younger children. PROVIDED ALWAYS that if either of them the said H. B. and I. B., shall die under the age of twenty-one years, without having been married, then the share of her so dying, of and in the said residue of the said sum of £———, 3*l.* per cent. Consolidated Bank Annuities, shall go and remain to the said C. B., E. Y., F. B. and G. B., and the survivor of them, the said H. B. and I. B., in equal shares.

Proviso, that if both infant daughters should die under 21, PROVIDED FURTHER NEVERTHELESS, that if both of them the said H. B. and I. B. shall die under the age of twenty-one years, without having been married, then and in such case, as well the

original share of the survivor of them, so dying, as the share which by virtue of the last-mentioned clause shall have survived or accrued to the survivor of them, of and in the said residue of the said sum of £———, 3*l.* per cent. Consolidated Bank Annuities shall go and remain to the said C. B., E. Y., F. B., and G. B., in equal shares: PROVIDED ALSO that it shall be lawful for the said [*father*] and [*mother*], or the survivor of them, at any time or times hereafter, by deed to revoke all or any of the trusts and provisions hereinbefore declared and contained, of and concerning the said residue of the said sum of £———, 3*l.* per cent. Consolidated Bank Annuities, and the interest and dividends thereof, or any part thereof respectively, and to appoint and declare any new or other trusts or provisions concerning the same respectively.

VI. Of Trust-Funds to Children equally.

without having been married, the original and accruing share of the survivor shall go to the other younger children.

Power of revocation.

IN WITNESS, &c.

VII. *REVOCATION of Appointment* (*see the last Precedent*), *and* NEW APPOINTMENT (*by Endorsement below the revoked Appointment*).

TO ALL TO WHOM THESE PRESENTS SHALL COME, the within-named [*father*] sends greeting. WHEREAS the above-named [*mother*] died on the ——— day of ———, 18—. AND WHEREAS the above-named H. B. died on the ——— day of ———, 18—, an infant and unmarried. AND WHEREAS the said I. B. attained the age of twenty-one years on the ——— day of ———, 18—. AND WHEREAS the above-named A. B. [*the eldest son*] has under or by virtue of the will of his maternal uncle, G. H., of &c., deceased, become seised of or entitled to certain hereditaments in the county of ———, and is otherwise sufficiently provided for. NOW THESE PRESENTS WITNESS, that the said [*father*], in exercise of the power reserved to him by the above-written deed (*m*), and of every other power in this behalf him enabling, hereby revokes the appointment made by the above-written deed and the trusts therein declared and contained. And also in exercise of the power reserved to him by the within-written indenture, and of every other power in this behalf him enabling, appoints that the above-mentioned sum of

Recitals.

Revocation.

New appointment.

(*m*) As to election by appointees, where the appointor not having reserved a power of revocation, purports to make a new appointment, see *Pickersgill* v. *Rodger*, 15 Ch. D. 163.

VII. Revocation and New Appointment.

£———, 3*l.* per Cent. Consolidated Bank Annuities, shall remain and be in trust for the above-named C. B., E. Y., F. B., G. B., and I. B. PROVIDED ALWAYS, that it shall be lawful for the said [*father*] at any time or times hereafter by deed to revoke, &c. (*ut ante*, p. 785).

Power of revocation.

IN WITNESS, &c.

VIII. *APPOINTMENT of a Domestic* CHAPLAIN *by a* NOBLEMAN (*n*).

Appointment.

KNOW ALL MEN BY THESE PRESENTS, that I, the Right Honourable G., Earl of ———, hereby nominate and appoint the Reverend A. B., of &c., Clerk in Holy Orders, Master of Arts, to be one of my domestic chaplains (*o*); and to hold and enjoy all the rights, privileges, liberties, and advantages whatsoever due and granted to the chaplains of barons and peers of the United Kingdom of Great Britain and Ireland, under or by virtue of the laws and statutes thereof. Given under my hand and seal this ——— day of ———, 18—.

SIGNED, SEALED (*p*), AND DELIVERED, in the presence of

(*n*) The number of chaplains which the lords spiritual and temporal and other persons may appoint, is as follows:—An archbishop, eight; a duke, six; a marquis or earl, five; a viscount, four; a bishop, six; the lord chancellor, a baron, or a knight of the garter, three; all peeresses, being widows, two; treasurers of the Queen's household, the Queen's secretary, the dean of the chapel, the Queen's almoner and the Master of the Rolls, two; the judges of her Majesty's Supreme Court of Judicature, the warden of the Cinque Ports, the Chancellor of the Duchy of Lancaster, and the Attorney-General and Solicitor-General, one: 1 Stephens' Laws of the Clergy, 265.

Privileges for temporary non-residence.

(*o*) By the stat. 1 & 2 Vict. c. 106, after imposing penalties for non-residence, it is provided that (among other persons) every chaplain to the Queen, King, Queen Dowager, Queen's or King's children, brothers, or sisters, archbishop or bishop, or House of Commons, "shall with respect to residence on a benefice under this Act be entitled to account the time in any year during which he shall be so as aforesaid, . . . performing duties as if he had legally resided during the same time on some other benefice:" Sect. 38.

(*p*) By the stat. 21 Hen. 8, c. 13, s. 22 (repealed by the stat. 1 & 2 Vict. c. 106, s. 1), a chaplain was required, "when need be to exhibit letters, under the hand and seal of his lord and master, testifying whose chaplain he is." Notwithstanding the repeal, these appointments are usually by deed. Stamp, 10*s.*

Stamp.

IX. *APPOINTMENT of a* CHAPLAIN *by a* BISHOP.

Appointment.

TO ALL MEN TO WHOM THESE PRESENTS SHALL COME, WE, by Divine permission, Lord Bishop of ———, send greeting. Know ye that we, in consideration of the learning, good life, and piety of our beloved in Christ, the Reverend A. B., of &c., clerk &c., hereby nominate and appoint him to be one of our domestic chaplains, to hold and enjoy all the rights, privileges, liberties, and advantages whatsoever due and granted to the chaplains of the bishops and peers of this realm, under or by virtue of the laws and statutes thereof. Given under my hand and seal this ——— day of ———, in the year of our Lord, 18—, and in the ——— year of our translation (*q*).

SIGNED, SEALED, AND DELIVERED, in the presence of

X. *APPOINTMENT of a* GAMEKEEPER *to kill Game, seize Engines, &c.* (*r*), *also Fishing Nets, &c.*

Appointment.

KNOW ALL MEN BY THESE PRESENTS, that I [*lord or lady*], of &c., lord [*or lady*] of the manor of ———, in the

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(*q*) See *ante*, p. 786, notes.

(*r*) The stat. 1 & 2 Will. 4, c. 32 (which extends only to England and Wales), by sect. 1, repeals the following statutes :— 13 Rich. 2, st. 1, c. 13; 22 Edw. 4, c. 6; 11 Hen. 7, c. 17; 19 Hen. 7, c. 11; 14 & 15 Hen. 8, c. 10; 25 Hen. 8, c. 11; 33 Hen. 8, c. 6; 23 Eliz. c. 10; 2 Jac. 1, c. 27; 7 Jac. 1, c. 11; 22 & 23 Car. 2, c. 25; 4 Will. & M. c. 23; 5 Anne, c. 14; 9 Anne, c. 25; 8 Geo. 1, c. 19; 10 Geo. 2, c. 32; 26 Geo. 2, c. 2; 28 Geo. 2, c. 12; 2 Geo. 3, c. 19; 13 Geo. 3, c. 55; 39 Geo. 3, c. 34; 43 Geo. 3, c. 112; 48 Geo. 3, c. 93; 50 Geo. 3, c. 67; 58 Geo. 3, c. 75, and 59 Geo. 3, c. 102.

Game: Stat. 1 & 2 Will. 4, c. 32. Repealed Acts.

By sect. 5 it is provided, that the Act shall not affect any law in force respecting game certificates (except as thereinafter mentioned) either as to game, or as to any woodcocks, snipe, quail, or landrail, or any conies. "And that all regulations and provisions contained in any Act or Acts relative to game certificates, so far as they relate to gamekeepers of manors, and to the amount of duty for game certificates to be charged upon or in respect of gamekeepers of manors in the cases specified in such Act or Acts, shall extend and apply to all gamekeepers *of lands* appointed under this Act, as fully and effectually as if they were gamekeepers of manors, and were expressly mentioned in and charged by such Act or Acts."

Act not to affect laws respecting game certificates.

X. Gamekeeper to Kill Game, &c.

county of ———, hereby appoint [*gamekeeper*], of &c., yeoman [*gentleman or esquire*], to be a gamekeeper of and in

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Every certificated person may kill game subject to the laws of trespass. Proviso as to gamekeepers.

Sect. 6. "That every person who shall have obtained an annual game certificate, shall be authorized to kill and take game, subject always to an action, or to such other proceedings as are hereinafter mentioned, for any trespass by him committed in search or pursuit of game; provided that no game certificate on which a less duty than 3*l.* 13*s.* 6*d.** is chargeable, shall authorize any gamekeeper to kill or take any game, or to use any dog, gun, net, or other engine or instrument for killing or taking game, except within the limits included in his appointment as gamekeeper."

* See stat. 23 & 24 Vict. c. 90, *infra*.

Under existing leases the landlord to have the game, except in certain cases.

Sect. 7. "Where the land is occupied under any lease or agreement made before the passing of the Act, the landlord shall have the right of entering, or of authorizing any certificated person or persons to enter upon the land for the purpose of killing or taking the game thereon; and no occupier under such lease or agreement, whether for life or for years, shall kill or take the game, except where the right has been granted under such lease or agreement, or where the lease has been made or renewed upon fine, or in case of a lease or agreement for more than twenty-one years."

Act not to affect agreements respecting game nor rights of manor, chase, or warren.

Sect. 8. "The Act shall not give any power over the game to any person seised or possessed of or holding any land where "by any deed, grant, lease, or any written or *parol* demise or contract" a right of entry for the purpose of killing or taking the game, has been or shall be reserved or retained by, or given, or allowed to any person; nor affect any reservation, exception, covenant, or agreement, already contained in any private Act of Parliament, deed, or writing relating to the game upon any land, nor prejudice the rights of any lord or owner of any forest, chase, or warren, or of any lord of any manor, lordship, or royalty, or reputed manor, &c., or of any steward of the Crown of any manor, &c. appertaining to his Majesty."

Sect. 9. Act not to affect any of the forest rights, &c. of the Crown.

Sect. 10. Act not to affect any cattlegates or right of common, but the lord of the manor shall have the game on the wastes, and may grant privileges of shooting, &c. there.

Sect. 11. The landlord having the game may authorize others to kill it.

Lords of manors may appoint gamekeepers.

Sect. 13 enacts, "That it shall be lawful for any lord of a manor, lordship, or royalty, or reputed manor, &c., or the steward of the Crown of any manor, &c., appertaining to his Majesty, by writing under hand and seal, or, in case of a body corporate, then under the seal of such body corporate, to appoint one or more person or persons as a gamekeeper or gamekeepers, to preserve or kill the game within the limits of such manor, &c., for the use of such lord or steward thereof; and to authorize such gamekeeper or gamekeepers, within the said limits, to seize and take for the use of such lord or steward all such dogs, nets, and other engines and instruments for the killing and taking of game, as shall be

Powers of gamekeepers.

my said manor during my will and pleasure, with full power, license, and authority, within and upon my said manor, to

X. Gamekeeper to Kill Game, &c.

used within the said limits, by any person not authorized to kill game *for want of a game certificate.*"

Lords of manors may grant deputations.

Sect. 14. "That it shall be lawful for any lord of a manor, &c., or any steward of the Crown of any manor, &c., appertaining to his Majesty, to appoint and depute any person whatever, whether acting as a gamekeeper to any other person or not, or whether retained and paid for as the male servant of any other person or not, to be a gamekeeper for any such manor, &c., or for such division or district of such manor, &c., as such lord or steward of the Crown shall think fit; and to authorize such person, as gamekeeper, to kill game within the same, for his own use or for the use of any other person or persons who may be specified in such appointment or deputation, and also to give to such person all such powers and authorities as may by virtue of this Act be given to any gamekeeper of a manor; and no person so appointed gamekeeper, and empowered to kill game for his own use or for the use of any other person so specified as aforesaid, and not killing any game for the use of the lord or steward of the Crown of the manor, &c., for which such deputation or appointment shall be given, shall be deemed to be or shall be entered or paid for as the gamekeeper or male servant of the lord or steward making such appointment or deputation, anything in any Act or Acts contained to the contrary notwithstanding."

Regulations respecting appointments of gamekeepers in Wales.

Sect. 15. "That it shall be lawful for every person who shall be entitled to kill the game upon any lands in Wales of the clear annual value of 500*l.*, whereof he shall be seised in fee or as of freehold, or to which he shall otherwise be beneficially entitled in his own right, if such lands shall not be within the bounds of any manor, &c., or if, being within the same, they shall have been enfranchised or alienated therefrom, to appoint by writing, under his hand and seal, a gamekeeper or gamekeepers to preserve or kill the game over and upon such his lands, and also over and upon the lands in Wales of any other person, who, being entitled to kill the game upon such last-mentioned lands, shall by license in writing authorize him to appoint a gamekeeper or gamekeepers to preserve or kill the game thereupon, such last-mentioned lands not being within the bounds of any manor, &c., or having been enfranchised or alienated therefrom; and it shall be lawful for the person so appointing a gamekeeper or gamekeepers to authorize him or them to seize and take for the use of the person so appointing, upon the lands of which he or they shall be appointed gamekeeper or gamekeepers, all such dogs, nets, and other engines and instruments for the killing or taking of game as shall be used upon the said lands by any person not authorized to kill game for want of a game certificate."

All appointments of gamekeepers to be registered with the clerk of the peace.

Sect. 16. "That no appointment or deputation of any person as a gamekeeper by virtue of this Act shall be valid unless and until it shall be registered with the clerk of the peace for the county, riding, division, liberty, franchise, city, or town, wherein the manor, &c., or the lands shall be situate, for or in

X. Gamekeeper to Kill Game, &c.

preserve *or kill* (*s*) the game for my sole use and benefit, and also within the said limits to take and seize for my use

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respect of which such person shall have been appointed gamekeeper; and in case the appointment of any person as gamekeeper shall expire or be revoked, by dismissal or otherwise, all powers and authorities given to him by virtue of this Act shall immediately cease and determine."

By sect. 36, persons entitled to game, or occupying the lands, or their gamekeepers or servants, are authorized to take game from trespassers. By sect. 2, the word "game" is declared for the purposes of that Act to include *hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.*

What is game.

In lieu of duties repealed, the duties herein named to be levied.

The 23 & 24 Vict. c. 90, after repealing previous duties (sect. 1), enacts, sect. 2, "In lieu of the duties hereby repealed there shall be granted, charged and paid for and upon the several Licences and Certificates to take or kill game, and Licences to deal in game hereinafter mentioned, the respective duties or sums of money hereinafter expressed or denoted (that is to say),

"For a Licence in Great Britain, or a Certificate in Ireland, to be taken out by every person who shall use any dog, gun, net or other engine for the purpose of taking or killing any game whatever, or any woodcock, snipe, quail or landrail, or any conies, or any deer, or shall take or kill by any means whatever, or shall assist in any manner in the taking or killing by any means whatever, of any game or any woodcock, snipe, quail or landrail, or any coney, or any deer:—

	£	*s.*	*d.*
"If such Licence shall be taken out after the 5th day of April and before the 1st day of November,			
"To expire on the 5th day of April in the following year	3	0	0
"To expire on the 31st day of October in the same year in which the Licence or Certificate shall be taken out	2	0	0
"If such Licence or Certificate shall be taken out on or after the 1st day of November,			
"To expire on the 5th day of April following ..	2	0	0
"Provided always, that any person having the right to kill game on any lands in England or Scotland shall be entitled to take out a Licence to authorize any servant for whom he shall be chargeable to the duty of assessed taxes as a gamekeeper to kill game upon the same lands, upon payment of the duty of ..	2	0	0
"And for every Licence to deal in game in England, Scotland or Ireland, to be granted under this Act	2	0	0

Licences may be taken out on behalf of assessed ser-

"7. Any person having the right to kill game on any lands in England or Scotland, and being charged, or liable to be charged, to the assessed tax on servants in respect of any gamekeeper, by

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(*s*) If the appointment be made by a trustee, it seems that the words in italics should be omitted. See *Webb* v. *Earl of Shaftesbury*, 7 Ves. 488; *Hutchinson* v. *Morritt*, 3 You. & C. 547.

all such dogs, nets, and other engines and instruments for the taking or killing of game, as within the precincts of my

whomsoever deputed or appointed, and whether deputed or appointed or not, and any person granting a deputation or appointment in Great Britain to the servant of any other person who shall be duly charged to the assessed tax on servants in respect of such servant, whether as gamekeeper or in any other capacity, with power and authority to take or kill any game, shall respectively be at liberty to take out a Licence to kill game on behalf of any such servant, on payment of the duty of 2*l.* for the year ending on the 5th day of April, and such Licence shall exempt the servant named therein during his continuance in the same capacity and service, and on his quitting such service shall also exempt any servant who shall succeed him in the same service and capacity, or who shall succeed to the deputation of the same manor or royalty or lands within the year for which the Licence is granted, during the remainder of such year; and no such servant on whose behalf a Licence shall have been duly obtained as aforesaid shall be required to obtain a Licence for himself, or be liable to any penalty by reason of not obtaining a Licence in his own name."

vants acting as gamekeepers for persons having right to kill game, or under deputations from lords of manors.

"8. Every such Licence to kill game taken out on behalf of any such servant as aforesaid shall, upon the revocation of any such deputation or appointment, or on his quitting the service of the master by whom such Licence shall have been taken out, be from thenceforth of no further effect as to the person named therein as such servant, or so deputed or appointed as aforesaid; but if within the year for which such Licence was granted the said master, on the quitting of such servant, shall employ another servant as gamekeeper in his stead, or the person by whom such deputation or appointment was made shall, on the revocation thereof, make a new deputation or appointment to any person in his service, or in the service of the same master by whom such Licence shall have been taken out, and who shall have been charged or be chargeable to the said assessed tax on servants as aforesaid, the officer by whom such Licence was granted, or the proper officer appointed by the commissioners in that behalf, shall renew such Licence for the remainder of that year, on behalf of the fresh servant or the person so newly appointed, as the case may be, without payment of any further duty, by indorsing on such Licence the name and place of abode of the said last-mentioned servant, or the person to whom such last-mentioned deputation or appointment shall have been granted, and declaring the same to be a renewed Licence free of duty."

On change of gamekeeper, or revocation of deputation, Licence may be continued to successor.

"9. Provided always, that no such Licence taken out for or on behalf of any person, being such servant or acting under a deputation or appointment as aforesaid, shall be available for such person in any suit or prosecution where proof shall be given of his doing or having done any act for which a Licence is required under this Act on land on which his master had not a right to kill game."

Such Licences not available for acts done out of limits of the manor or lands for which the parties are appointed gamekeepers.

As to Licences to carry guns, see stat. 33 & 34 Vict. c. 57; and as to the right of occupiers to kill ground game, stat. 43 & 44 Vict. c. 47.

X. Gamekeeper to Kill Game, &c.

said manor of ——— shall be used by any person not authorized to kill game for want of a game certificate: [And I hereby authorize (*u*) the said [*gamekeeper*] to demand,

Gamekeeper to seize fishing nets.

LORD OWNER OF FISHERY.

(*u*) The words in brackets will be added if the lord of the manor be owner or occupier of any river or fishery within the manor.

By sect. 25 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), "If any person shall at any time be found fishing against the provisions of this Act, the owner of the ground, water, or fishery where such offender shall be so found, his servant, or any person authorized by him, may demand from such offender any rod, line, hook, net, or other implement for taking or destroying fish which shall then be in his possession, and in case such offender shall not immediately deliver up the same, may seize and take the same from him for the use of such owner." But persons angling in the daytime in private waters are, on seizure of their tackle, exempt from the penalties imposed by sect. 24 of the Act. The following passages from Mr. Bythewood's notes on the subject of the appointment of gamekeepers, are retained on account of the incidental information which they contain.

Reputed manors give no right to appoint gamekeepers.

The *quasi* lord or lady of a *reputed* manor had no power, under any of the repealed Acts (see p. 787, n), to appoint a gamekeeper either to *seize* guns, engines, &c., or to *kill* game. See now *Bush* v. *Green*, 5 Scott, 289. Many of the places which are called manors would not be found to be such in point of law, if the matter were strictly examined. To constitute a manor it is necessary, not only that there should be two freeholders within the manor, but *two freeholders holding of the manor, subject to escheats; Glover* v. *Lane*, 3 T. R. 447; *Bradshaw* v. *Lawson*, 4 T. R. 446; *Rumsey* v. *Walton*, cited there; *Chetwode* v. *Crew*, Willes, 618; but a copyhold manor is not capable of an escheat of a freehold, because that which comes in lieu of another ought to be of the same nature, and then the freehold escheated would be copyhold, which is repugnant and impossible: *Rex* v. *Staverton*, Yelv. 190. As to what is *primâ facie* evidence of the existence of a manor, see *Doe* d. *Beck* v. *Heakin*, 6 Ad. & El. 495; 2 Nev. & P. 660.

Manor extinct for want of freeholders.

If all the freeholds, except one, escheat or become forfeited to the lord; or if he purchase all the freeholds except one; or if he grant away the services of all the freeholders except one; or release their services to all the freeholders except one; notwithstanding the demesnes and services of the copyholders remain, and although it be known by the name of a manor, yet it is not in law a manor, for want of freeholders, the maintainers and upholders of a Court Baron. But the lord may still hold a court for the copyholders: 4 Rep. 26 b; Co. Cop. s. 31, Tr. 53; *Vines* v. *Durham*, cited *Sir Moyle Finch's case*, 6 Rep. 67 a. And although it would cease to be a legal manor, yet it would still be a seigniory in gross: F. N. B. 3, C.; 1 Watk. Cop. by Cov. 26; 1 Cru. Dig. 37, 4th ed.; 3 Bac. Abr. 682, 7th ed., *Fines & Rec.* (B.); Co. Tr. 54. The manor is extinct; because there cannot be a manor unless there be a Court Baron, which is the chief prop and pillar

seize, take, and keep, for my own use, all rods, lines, hooks, nets, and other implements for taking or destroying fish, X. Gamekeeper to Kill Game, &c.

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of a manor; Co. Cop. s. 31, Tr. 49; and a Court Baron cannot be held unless there be two suitors at the least; *The King* v. *Staverton*, Yelv. 190, 191; because in a Court Baron the suitors are the judges; Co. Litt. 58. a.; *Melwich* v. *Luter*, 4 Rep. 26. b.; 4 Inst. 268; Co. Tr. 51; and not the steward; *Chetwode* v. *Crew*, Willes, 619; *Howard* v. *Wood*, Sir T. Jones, 126; *S. C.*, 2 Lev. 245; and if there be but one suitor, he has no peer, and consequently there is no person to sit in judgment on him in the manor court; *Baldwin* v. *Tudge*, 2 Wils. 20; and therefore, when there is but one freehold remaining, the manor is extinct and determined: Bro. Abr. *Comprise*, &c. Pl. 31, 150 b.; *Tenures*, pl. 102; *Suite and Contribution*, pl. 17; *Court Baron*, &c. pl. 22; Kitchen on Courts, 4 a. Fr. ed.; 7 4th ed. So if the lord transfer to a stranger the services of all his tenants, and reserve to himself the demesnes, or if he grant away the demesnes and reserve the services, in both cases the lord has a manor only in name; because in the first case he wants demesnes, and in the other he wants services: Co. Tr. 53; *Sir Moyle Finch's case*, 6 Co. 64. a.; *The King* v. *The Bishop of Chester*, Skin. at p. 661; 1 English Copyholder, 379. After a partition of the demesnes and services, either by joint tenants, tenants in common, or coparceners, it seems that they may hold *one* joint Court Baron, and consequently may jointly appoint gamekeepers: *Vide infra*, tit. Partition.

Extinction by separating the services from the demesnes.

Although a manor exists only by reputation, yet nevertheless all its *prescriptive* rights remain; such as the right to wrecks, estrays, &c.; and if there be but one freehold tenant, the seigniory and services to him remain. The power to appoint a gamekeeper seems not to be a prescriptive right, but this question is of no practical importance, as the present Act extends to lords of manors, &c. *in reputation* merely.

The *prescriptive* rights of a reputed manor remain.

No lord or lady of a manor, *under the degree of an* esquire, could appoint gamekeepers to *seize* guns, nets, and other engines used for the destruction of game, under the 22 & 23 Car. 2, c. 25, s. 2, whatever the estate might be; for no landed estate, however large, will confer the title, as the term *esquire* has no relation whatever to landed property; but it must be acquired either by office, the king's patent, or some of the means laid down by Selden and Camden. A lord of a manor is certainly not an esquire by virtue of his manor or royalty, though in common acceptation he is considered as such. Per *Willes*, J., *Jones* v *Smart*, 1 T. R. at p. 50.

No lord of a manor *under* the degree of an esquire can appoint gamekeepers to *seize* engines, &c.

Esquires in law, and properly so called, are the sons of all the peers and lords of Parliament, in the lives of their fathers: 2 Inst. 667; 2 Vin. Abr. 84, pl. 28; the eldest sons of the younger sons of peers, and their eldest sons, in perpetual succession; Judge Doderidge's Nobility, 144 (the second, for after page 170, the next page is numbered, by mistake, 105); Selden's tit. Honour, 342; and, consequently, the younger sons of peers, after the death of their fathers: Cowell's Interpreter,

Who are esquires.

X. Gamekeeper to Kill Game, &c.

which he shall find used, or laid, or in the possession of any person or persons whomsoever, fishing in any river or fishery

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Esquier. All the noblemen of other nations, and Scotch and Irish peers, if they be not knights: 3 Selden's Works, 848; 2 Inst. 667. The eldest sons of baronets; Cow. *ut supra;* the eldest sons of knights; 2 Inst. 596, 667; Wood's Inst. 45, 10th ed.; and their eldest sons for ever: Dod. Nobility, 144; Selden's tit. Honour, 342, ed. 1614. Esquires created expressly, with a collar of SS. and spurs of silver; Spelman's Glossary, *verbo Armigeri*, 3 Selden's Works, 853-4; tit. Honour, 342; of which, at present, there are none. Persons to whom the King gives arms by letters patent, with the title esquire, and their eldest sons for ever: Seld. tit. Hon. 343; Com. Dig. *Dignity* (B. 8). Esquires of knights of the bath, each of whom formerly constituted *two* at his installation; 3 Selden's Works, 851; Byshe's Upton de Studio Militari, 21; 1 Dugdale's Antiquities of Warwickshire, 708, Appendix; Stuart's View of Society in Europe, 433, 2nd ed.; Anstis's Historical Essay upon the Knighthood of the Bath, 66, 72, 99, ed. 1725; Stow's Annals, 899; but the number now is *three;* for by the statutes of the Order of the Bath, s. 15, 23 May, 11 Geo. 1, at which time the order was revived, each knight is required to have at his installation one young esquire, and two esquires governors; all of whom have the same rights and advantages as gentlemen of the privy chamber; and it is by the same section declared, that the eldest son of every of these esquires shall have and use the addition and title of esquire in all acts, proceedings, and pleadings: Statutes of the Order of the Bath, p. 32. Barristers-at-law, by their office or profession: Spelm. and Cow. *ut supra; Messor* v. *Molyneux*, cited 1 Wils. 245. Justices of the peace, while in the commission, but not justices of the peace of corporate towns, &c.: Cow. *ut supra; Rex* v. *Brough, Mayor of Hedon*, 1 Wils. 244. Persons chosen esquires to the body of the prince; Selden's tit. Honour, 342; Judge Doderidge's Nobility, 144, *ut supra;* of which, at present, there are none, their place being supplied and rendered unnecessary by means of a standing army. Persons attending upon the King's coronation in some employment, or persons employed in any superior office in the kingdom, or serving in some place of better note in the King's household: Dod. Nobility, 144-5; Selden's tit. Honour, 343. And it has been *supposed*, that all who bear an office of trust under the Crown, and who are styled esquires by the King in their commissions and appointments; as they are once honoured by the King with the title of esquire, they have a right to that distinction *for life;* Christian's note, 1 Bla. Com. 406 (19); such, for instance, as sheriffs of counties, or captains in the army or navy: Christian's Game Laws, 132. Notwithstanding the 44 Geo. 3, c. 54, s. 26, enacted, that all officers in corps of volunteers, having commissions from lieutenants of counties, should *rank* with the officers of his Majesty's regular forces, yet a commission signed by the lord lieutenant of a county, and announced in the Gazette, constituting a person captain commandant of a corps of volunteer

whatsoever within my said manor without my consent.] GIVEN under my hand and seal, this ——— day of ———. X. Gamekeeper to Kill Game, &c.

[*lord*] L. S.

SIGNED, SEALED, AND DELIVERED, in the presence of

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infantry, and styling him an *esquire*, does not create such a person an esquire, because the lord lieutenant cannot confer honours; and the Court said there was no pretence to call such a gentleman an esquire: *Talbot* v. *Eagle*, 1 Taunt. 510. Although, according to Mr. Serjt. Lens's opinion, 2 Burn's Justice, Chetwynd's ed. 505, that "the eldest son of a clergyman is not as such qualified under any of the descriptions of the stat. 22 & 23 Car. 2, c. 25, s. 3; and that it makes no difference in this respect that the father is a Master of Arts in an English university, and in the commission of the peace:" still it seems that a clergyman in the commission of the peace, lord of a manor, would have been considered as not being *under the degree* of an esquire, according to the description in the repealed statute. The ground of the learned serjeant's opinion perhaps is, that such a clergyman is neither an esquire, nor a "person of *higher* degree." Clergymen.

As married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves, except such rank be merely professional or official, and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers (1 Bla. Com. 406, n.), it seems that these ranks must be the criterion by which to judge, whether, as ladies of manors, they were enabled to appoint gamekeepers to *seize* engines, &c. *Willes*, C. J., appears to have mistaken the words of the statute, when he says, a lady of a manor cannot bear the title required by the statute of Charles the Second: *Mallock* v. *Eastly*, 7 Mod. at p. 488. The daughter of a peer, the widow of a knight, &c., are not under the degree of an esquire, and, most clearly, under the statute of Charles the Second, they had authority to appoint a gamekeeper to seize engines, &c. Ladies of manors.

The person to appoint a gamekeeper under the recent Act must (except as to Wales) be *dominus pro tempore;* for under the rule *delegatus non potest delegare*, a man cannot give or convey to another the power of appointing a gamekeeper, without a conveyance also of the manor itself. Such a power is a mere emanation of the manor, &c., and inseparable from it. It is a mere shadow, accompanying the substance: *Calcroft* v. *Gibbs*, 5 T. R. 20. The lord of a manor cannot authorize another person to appoint a gamekeeper.

FISHERY.

In rivers not navigable the proprietors of the land have the right of fishery on their respective sides; and it generally extends *ad filum medium aquæ*. But in navigable rivers the proprietors of the land on each side have it not: the fishery is common; it is, *prima facie*, in the king, and is public. If any one claims it exclusively, he must show a right. If he can show Who have the right of fishing in rivers.

XI. *APPOINTMENT of a* GUARDIAN *by an Infant.*

Appointment.

KNOW ALL MEN BY THESE PRESENTS, that I [*infant*], of &c., spinster, aged ——— years, or thereabouts, daughter of ———, late of &c., deceased (*x*), by ——— his wife, also

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a right by prescription, he may then exercise an exclusive right; though the presumption is against him, unless he can prove such a prescriptive right. Therefore he may have an exclusive privilege of fishing, even in an arm of the sea; such a right shall not be presumed, but, on the contrary, *primâ facie;* but it is capable of being proved: *Carter* v. *Murcot*, 4 Burr. 2164; *Rex* v. *Wharton*, 12 Mod. 510; *Lord Fitzwater's case*, 1 Mod. 105; *The Corporation of Orford* v. *Richardson*, 4 T. R. 437. A grant of a several fishery passes nothing but the liberty of fishing, and not the ownership in the soil; being therefore an incorporeal and not a territorial hereditament, it cannot be granted even for a term of years without deed: Co. Litt. 4 b.; *Duke of Somerset* v. *Fogwell*, 5 B. & Cr. 875. But it should seem that where the owner's claim is founded on prescription, and the terms of the grant are not known, it would be presumed that he was the owner of the soil: 5 B. & C. 886.

Grant of a several fishery does not pass the soil.

See further, Com. Dig. *Justices of the Peace* (B. 44); 2 Burn's Justice, 548, 30th ed.; *Fish and Fisheries*, I.; 3 Edw. 1, c. 1; 2 Inst. 152.

Stamp, 10*s*.

For the appointment of a gamekeeper, under stat. 1 & 2 Will. 4, c. 32, a deed stamp of ten shillings is required. A mere authority to seize nets, &c. requires neither seal nor stamp.

ON GUARDIANSHIP BY ELECTION.

(*x*) The right of making a guardian by election of the infant himself only arises, when, from a defect of law, the infant finds himself wholly unprovided with a guardian: Harg. n. Co. Litt. 88 b. (16).

Different kinds of guardianship.

For the purpose of ascertaining when the infant may exercise this right, it will be requisite to state a few particulars concerning the different kinds of guardianship.

Guardian in socage;

Guardianship by *socage* springs wholly out of *tenure;* and therefore the title to it cannot arise, unless the infant be seised of the legal estate in lands, or other hereditaments lying in tenure, holden by socage, as most of the lands in England now are: *Rex* v. *Inhabitants of Toddington*, 1 Barn. & Ald. 560. As to guardianship by custom, see 2 Watk. Cop. by Cov. 79; Scriv. Cop. 6th ed. 21, 76; Robinson on Gavelkind, 237. As to the custom of London, which is now obsolete, see *Frederick* v. *Frederick*, 1 P. Wms. 710; Com. Dig. *Guard.* (G. 4); *Rutter* v. *Rutter*, 1 Vern. 180. This kind of guardianship takes place on a *descent* only, *Quadring* v. *Downs*, 2 Mod. 176, and the title to it is in such of the infants next of *blood* as cannot have the socage estate, in respect of which the guardianship arises, by descent: Bract. 876; Co. Litt. 87. b. Thus, if the lands have descended to the infant from his father or any paternal relation, his mother, if living, will be his guardian in socage, see *Rex* v. *Sutton*, 5 Nev. & M. 353; *S. C.*, 3 A. & E. 597; she not being competent to inherit them. If the infant has no mother, then his next maternal relation will be his guardian. In looking round, however,

deceased, hereby appoint [*guardian*], of &c., to be the guardian of my person and estates, and to do, execute, and per- XI. Guardian.

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amongst the infant's next of kin for a guardian, it must be borne in mind that the statute, 3 & 4 Will. 4, c. 106 (stated *ante*, p. 135), has let in relations of the half-blood, and thereby incapacitated them to become guardians in socage. The descent, however, is still traced as formerly from the last purchaser: and therefore in the case first supposed of a descent from the father, or any other paternal relation, the mother could not inherit, though lineal ancestors are by the statute rendered competent to inherit, she not being of the blood of the first purchaser. See *Carill* v. *Cuddington*, Plowd. 299. Where there are two relations of equal degree, the male or the elder relation is preferred: Harg. Co. Litt. 88 b. An infant not being liable to account, *Oliver* v. *Woodroffe*, 4 Mee. & W. 650, cannot be guardian in socage. See Co. Litt. 88 b. Guardianship in socage ends when the infant, whether male or female, attains fourteen; Hargr. n. Co. Litt. 88 b. (13); 3 Atk. 624; 1 Ves. sen. 91; even although the father be guardian on a maternal, or the mother on a paternal descent: Litt. s. 123. The heir may then elect a guardian; *Mendes* v. *Mendes*, 3 Atk. 624; 1 Ves. sen. 91; *Ex parte Watkins*, 2 Ves. sen. 470; see *Id.* 375: and at law he is then entitled to occupy the lands himself if he will, and call his guardian to account, although his own parent; Litt. s. 123; for the father or other ancestor, being guardian in socage, shall account with the infant for the profits; otherwise it would be more for the infant's advantage to have another person for his guardian: Co. Litt. 88 b.; 3 Bac. Abr. 404 (*a*). Guardianship by *nurture* only occurs by nurture; where the infant is without any guardian; and none can have it except the father or mother. It extends no further than the custody and government of the infant's *person*, and determines at fourteen, in the case both of males and females: Bro. Abr. *Garde*, pl. 70. Guardianship by *nature* is more extensive; for by nature; not only the father and mother, 2 Atk. 15, but every other ancestor may be guardians by nature, though with considerable differences, such as denote the superiority of the father's claim. The father has the *first* title to guardianship by nature, the mother the second; and as to other ancestors if the same infant happens to be heir apparent to two, as to both a paternal and a maternal grandfather, perhaps in this equality of rights, priority of possession of the infant's person may decide the preference, according to the general rule, in *æquali jure melior est conditio possidentis:* Plowd. 296. This guardianship extends no further than the custody of the infant's *person;* Carth. 386; *Rex* v. *Sherrington*, 3 B. & Ad. 714; *Villareal* v. *Mellish*, 2 Swanst. 536; which it yields to the guardian in socage, until the infant attains fourteen, but guardianship by nature continues till the infant attains the age of twenty-one: Hargr. n. Co. Litt. 88, b (12); 3 Bac. Abr. 404. However, the proper age to apply to the Court to remove a parent from being guardian, in a male is fourteen, in a female twelve; but the Court will never do it without some misbehaviour in the parent: *Roach* v. *Garvan*, 1 Ves. sen. 158. As to the parental right to the guardianship and custody of in-

XI. Guardian. form during my minority, all such acts, matters and things whatsoever for me, and in my behalf, relating to me and my

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fants, see *Wellesley* v. *Duke of Beaufort*, 2 Russ. 1; 2 Bligh, N. S. 124; 1 Dow, 154; *Ball* v. *Ball*, 2 Sim. 35. See also *Rex* v. *Greenhill*, 4 Ad. & El. 624; *Rex* v. *Joley*, 5 Ad. & El. 441; *Ex parte Bailey*, 6 D. P. C. 311; stat. 2 & 3 Vict. c. 54; *Talbot* v. *Earl of Shrewsbury*, 4 Jur. 380; 4 My. & Cr. 672; *Re Taylor*, 4 Jur. 959, 983; *Re Goldsworthy*, 2 Q. B. D. 75; *Re Besant*, 11 Ch. D. 508; *Re Agar-Ellis*, 10 Ch. D. 49; *S. C.*, 24 Ch. D. 317; and see *ante*, p. 525.

by the father's appointment. 12 Car. 2, c. 24, s. 8.

By virtue of the 12 Car. 2, c. 24, s. 8, the *father*, although under twenty-one, may by deed, or (if of age) by will, appoint who shall be guardians of his children after his decease, until they attain twenty-one, or for any less period; and thereby he will disappoint the mother and other ancestors of the guardianship by nature, *Talbot* v. *Earl of Shrewsbury*, 4 Jur. 380, and the next of blood of the guardianship by socage.

Appointment by will.

The *testamentary* power of appointing guardians of their children given by this statute to *minors* has been taken away by the stat. 7 Will. 4 & 1 Vict. c. 26, s. 7. See sect. 1. Although a *deed* of appointment of guardianship under this Act is revocable, and has been said to be of a testamentary character, and revocable by will (*Earl of Shaftesbury* v. *Lady Harman*, Finch, 323; *Lecone* v. *Sheires*, 1 Vern. 442), yet as the Act has itself drawn a distinction between a deed and a will, and as it has been held that a mere appointment of a guardian, though in a testamentary form, is not a subject of probate (*Lady Chester's case*, Vent. 95; *Ex parte Earl of Ilchester*, 7 Ves. 364), it seems that an infant may still appoint a guardian of his children by deed. This kind of guardian has the custody not only of the lands descended or left by the father, but of all lands and goods any way acquired or purchased by the infant, which the guardian in socage had not: *Bedell* v. *Constable*, Vaugh. 177; 2 P. Wms. 102.

Although this power of appointing guardians does not extend to infant children, married at the father's death, yet, if they are then unmarried, the guardianship is not afterwards determined by marriage: *Earl of Shaftesbury's case*, cit. 3 Atk. 625. The statute has been held not to interfere with the lord's right to the guardianship of his infant copyhold tenant: *Clench* v. *Cudmore*, 3 Lev. 395. A father may, under this statute, by will give authority to a surviving guardian to nominate a person in the place of one who has died: *In the goods of Parnell*, L. R. 2 P. & M. 379.

A testamentary guardian stands in *loco parentis*, and has accordingly a right to the custody of the infant, enforceable by writ of *habeas corpus*, which the Court has no discretion to refuse if the applicant is a fit and proper person, and the infant too young to choose for himself: *Re Andrews*, L. R., 8 Q. B. 153.

An infant above seven, having no guardian, may elect one

The right to elect a guardian may therefore happen *before* fourteen, when the infant, whether male or female, Co. Litt. 88 a, has no such property as attracts a guardianship by tenure: 2 Fonbl. Eq. 225, 5th edit., and the father is dead, without having executed his power of appointing a guardian for his child, and there is no mother; but if the child be of such tender years that he can make no choice, that is, under seven years of age, see

estate, as a guardian may or ought to do. [But such guardianship to cease in case the said [*guardian*] should go to

Guardianship to cease on guardian's incapacity, &c.

Fitzgib. 164, then the next of kin, to whom the inheritance cannot descend, should have the custody of him, Co. Litt. 87 b, until a guardian be properly appointed by the Lord Chancellor, or by the infant himself. Or the right of making a guardian by election may happen *after* fourteen, when the custody of the guardian by socage terminates; and in case of the father's decease, from the want of his appointment, there is no other guardian ready to succeed to the trust, and to take care of the infant or his property: Harg. n. Co. Litt. 88 b (16); 1 Bla. Com. 426. And therefore a minor, after fourteen, although freed from custody, is at liberty, if willing, to put himself a second time under guardianship, until he is of full age. But if a minor, being an adult, does not consent to receive a new guardian, then no Court would appoint a guardian, unless *ad litem:* Harris's n. Just. Inst. lib. i. tit. xxiii. s. ii. Formerly, in case an infant was of the years of discretion, namely, fourteen, any payment made to him would have been good; for at that age the law held him able to govern and manage his own lands in socage, and consequently to receive the rents thereof: Wentworth's Office of Executor, 219, Wilson's ed.; 1 Powell's Swinb. on Wills, 295, par. iii. s. 14. So, formerly an infant could be an executor at seventeen; but since the 38 Geo. 3, c. 87, s. 6, he cannot act till he is twenty-one; and where he is sole executor, administration with the will annexed must be granted to his guardian, or to such other person as the spiritual Court shall think fit, until the infant attains twenty-one, at which period probate of the will may be granted to him. The power of an infant has been gradually restrained, and he is now thought to stand in need of a guardian of his person and property until twenty-one. See 2 Watk. Cop. by Cov. 76. As Lord *Coke* mentions the right of choosing a guardian by a male ward in socage *after* fourteen, Co. Litt. 78 b, even in his time a guardian must have been deemed necessary after that age. But it is remarkable that he omits mentioning it in the case of a female *after* fourteen. However, since the 12 Car. 2, c. 24, s. 8, it has been usual, for want of a guardian by the father's appointment, to allow infants, whether males or females, 1 Bla. Com. 463, and whether heirs or not (see Harg. n. Co. Litt. 88 b (12)), to elect guardians for themselves. But the appointment of a guardian by the infant himself, even after the age of fourteen, does not exclude the jurisdiction of the Court; and therefore, where a petition for the appointment of a guardian to an infant was resisted on the ground that the infant, who was of the age of seventeen, had by deed appointed a guardian for himself, Sir *J. Leach*, V.-C., referred it to the master to consider a proper person, observing, that the infant's appointment would not supersede the duty and authority of the Court: *Curtis* v. *Rippon*, 4 Madd. 462.

Power of infants over their property.

Infant's appointment of guardian does not exclude the jurisdiction of the Court.

Lord *Coke* omits stating how, and before whom the election should be made; nor does it appear that any prior or contemporary writer supplied the defect. Lord *Hardwicke* said it was

The election is usually made by deed.

XI. Guardian. reside abroad, refuse, or become incapable to act in the said guardianship, or become bankrupt or insolvent].

In witness, &c.

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frequently done before a judge on circuit, and that it was the constant practice to allow infants to choose their guardian, and what the Court of Chancery frequently called on infants to do; though he said this still is liable to any reasonable objection made to such choice: 2 Ves. sen. 375: and see *Savill* v. *Slingsby*, Tothill, 15, where an attachment issued against an infant to make him choose a guardian. See also Wyatt's Prac. Reg. 213, 223; Finch. Rep. 476; but it is not requisite that the election should be made before a judge: Harg. n. Co. Litt. 88, b. (16); 3 Atk. 624; Harr. n. Just. Inst. lib. i. tit. xxiii. s. ii. The last Lord Baltimore, when he was turned of *eighteen*, having no testamentary guardian, and being under the necessity of having one for some special purposes relative to his proprietary government of Maryland, named a guardian by *deed*. This mode was adopted by the advice of two eminent barristers; for though one of them at first doubted whether the administration of the government of the province was not devolved upon the Crown during the infancy, yet he afterwards concurred in thinking that the guardian named by the infant might act as lord proprietor. Indeed, it seems as if there was no prescribed form of an infant's electing a guardian after fourteen, any more than there is before; and, therefore, the learned Hargrave says, election by *parol* might perhaps be sufficient; though, he says, it would be wrong to trust to a mode so unsolemn: Hargr. n. Co. Litt. 88, b. (16). The form drawn by the celebrated conveyancer, Sir Orlando Bridgman, is under hand and seal; 1 Bridgman's Conveyances, 249, 5th ed.; and in the present day, the appointment or election is generally also made by deed; and therefore the duty of ten shillings becomes chargeable on it, as a deed not otherwise charged, under the Stamp Act, 1870, s 4, and Schedule.

The guardian of a male infant continues till 21;

of a female, till 21, or marriage.

The guardian appointed by a male infant after he is fourteen, continues till he is twenty-one, Bac. Abr. tit. *Guardian* (E.), and does not determine by his marriage: *Mendes* v. *Mendes*, 3 Atk. 625. So, likewise a guardian appointed by a female infant after she is fourteen, continues till she is twenty-one, unless she previously marry; for on marriage every kind of guardianship as to a female ceases, *Mendes* v. *Mendes*, 1 Ves. sen. 91, because the husband, immediately on the marriage, becomes her guardian; and it would be inconsistent that she should at the same time be under the power of another guardian: Bac. Abr. tit. *Guardian* (E.). However, where a female eleven years of age was sent to France for her education, and being intrusted to the care of a banker at Paris, he married her to his own son, who was not then seventeen years of age, Lord *Hardwicke* held that, though the Court of Chancery cannot appoint a guardian of a female after marriage, yet it will not determine a guardianship, or discharge any order made for a guardian because of a marriage: *Roach* v. *Garvan*, 1 Ves. sen. 159.

Whether ap-

It does not appear to be certain whether an appointment of a

guardian by an infant above the age of seven, and under the age of fourteen years, continues after the infant has attained fourteen; but it seems that it continues for the same period as it would if it had been made after fourteen. To avoid this doubt a ratification of the appointment has sometimes been recommended after the infant arrives at the age of fourteen years: *infra*, 808. In which case, if the ratification be delivered, it operates as a new deed, and becomes chargeable with another ten shilling stamp. But as to the necessity for delivery, and a stamp, the observations in the preceding page are here equally applicable.

Appointment under 14 continues after that age.

Stamp.

Neither a guardian in socage, Hargr. n. Co. Litt. 88, b. (13); 90, a. (1); *Bedell* v. *Constable*, Vaugh. 181; nor a testamentary guardian, *Mellish* v. *De Costa*, 2 Atk. 14; *S. C.* better reported, nom. *Villareal* v. *Mellish*, 2 Swanst. 533; nor consequently a guardian by election, can assign or transfer the guardianship to another; neither will it, upon the guardian's death, go to his executors or administrators, nor to the husband of a deceased wife, but it determines: Vaugh. 185; *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. at p. 121; 1 Woddes. Lec. 458. And in case a guardian in socage die, the guardianship shall go to the next of kin of the infant to whom the inheritance cannot descend: 2 Inst. 260. For though the office of guardian be an interest, yet it is an interest joined with a trust and confidence personally reposed in the guardian himself, either by the law, or by the person appointing him, wholly for the infant's benefit, and not in any respect for the guardian's profit: *Shoplane* v. *Roydler*, Cro. Jac. 98; Vaugh. 183; Plowd. 293. But it seems that, if two or more are made guardians, and one of them dies, the survivor or survivors will continue guardians; *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. at p. 104; for, from the nature of the thing, the authority must be joint and several; and were it otherwise, the more guardians were appointed for the security of the infant, the less secure would he be, because, upon the death of any one of them, the guardianship would be at an end: 2 P. Wms. 107, 121; 4 Bac. Abr. 98, 7th ed. However, it is usual to expressly appoint the survivors and survivor, guardians and guardian. Where several persons are appointed guardians by the Court of Chancery, the office does not survive: *Bradshaw* v. *Bradshaw*, 1 Russ. 528; but the Court will reappoint the survivors, without a reference to the master: *Hall* v. *Jones*, 2 Sim. 41.

Guardianship not transferable or transmissible.

When there are two or more guardians the office survives.

Some of the purposes for which a guardian by election is appointed, while the infant is under fourteen and has no guardian, are for enabling the guardian to make leases of the infant's lands, in which he has only an equitable estate, or in which, although he has the legal estate, yet he took them not by descent, but by purchase; for in neither of these cases is guardianship in socage attracted: *Rex* v. *Toddington*, 1 B. & Al. 560; *Quadring* v. *Downs*, 2 Mod. 176. But if the infant has any such lands as attract guardianship in socage, that is, lying in tenure, then the guardianship in socage attracts the custody of the infant's hereditaments not lying in tenure, and of his copyhold estates, unless there is either a special custom for the lord's

Guardianship by election, for making leases.

Guardianship in socage extends to what.

Guardian of copyholds.

appointing a guardian of them, Hargr. n. Co. Litt. 88. b. (13), or by the peculiar custom of the manor, the copyhold may by possibility descend to the guardian in socage; 2 Watk. Cop. by Cov. 79; and the guardian in socage is also, it seems, entitled as well to the custody of the infant's equitable estates in lands, of which there is no trustee expressly appointed, as of those lands which he took by purchase. However, as to leases made by a guardian by election before fourteen, the books are silent.

Leases by guardian by election after 14.

When, after fourteen, an infant is destitute of a guardian, he sometimes appoints one by election, principally to enable him to make leases of all the infant's lands. As to leases by this guardian, the books are clear; for it is said, the guardian before fourteen (that is, in socage), as well as he whom the infant thinks fit to choose after fourteen, are both of the same nature, and have the same office and employment assigned to them by the law, without any intervention or direction of the infant himself; for they were therefore appointed because the infant, in regard of his minority, was supposed incapable of managing himself and his estate, and consequently they derive their authority not from the infant, but from the law; and that is the reason they make leases, grant copies of court-roll, *Shoplane* v. *Roydler*, Cro. Jac. 99, make distress for rent of the infant's lands, Bradby on Distresses, 61, and transact all affairs in their own name, and not in the name of the infant, as they would be obliged to do if their authority were derived from him: 4 Bac. Abr. pp. 107, 783, 7th ed., Guardian (G), Leases (I) 9. And

Leases by other guardians.

although there is no authority as to leases of infants' lands taken by purchase, &c. made by guardians elected before fourteen, yet it seems, according to the prevailing opinion, founded on reasonable grounds, that guardians by the election of the infants themselves after they arrive at the age of fourteen, and guardians appointed by the father, or by the Court of Chancery, as well as guardians in socage, have the power of making valid leases of the infant's lands for so long a time as their guardianship continues. See 4 Bac. Abr. 784; Chambers on Leases, 35; 1 Ld. Raym. 131; 1 Leon. 158; Vaugh. 182; Plowd. 293; Cro. Jac. 55, 99; 2 Lev. 219; 2 P. Wms. 105; 3 Atk. 704; 14 Vin. Abr. 185; 2 Watk. Cop. by Cov. 82. However, it was held in *Roe* d. *Parry* v. *Hodgson*, 2 Wils. 129, 135, after the infant had come of age, that a testamentary guardian cannot make a lease of the infant's lands, and that a lease previously made by him for twenty-one years was absolutely void, and not merely voidable. But this decision has not been regarded in practice to the extent the words of the report might have warranted. For independently of the above citations, it is opposed by the great authority of Lord Chief Justice *Vaughan*, who clearly held that the office of a guardian appointed by the father, under 12 Car. 2, c. 24, as to the duty and power, is the same as the law before had prescribed and settled of guardian in socage, excepting that it may be held for a longer time, namely, till the heir attains the age of twenty-one; *Bedell* v. *Constable*, Vaugh. 179; and no point is more certain than that a guardian in socage could make valid leases in his own name, to continue during the guardianship.

As to the power of the Court to authorize leases of an infant's lands under the statute 11 Geo. 4 & 1 Will. 4, c. 65, see Simpson on Infants, 334; see also *Re Clark*, L. R., 1 Ch. 292; *Re Letchford*, 2 Ch. D. 719.

By sect. 41 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), the powers of the Court of selling and granting leases of settled lands under the Settled Estates Act, 1877, were extended so as to apply to lands to which an infant is entitled in fee simple, or at a leasehold interest at a rent. And by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 59, an infant entitled to land in fee simple is to be deemed a tenant for life thereof; and by sect. 60 of the same Act, the statutory powers of selling, leasing, &c. the land, are to be exercised on behalf of infant tenants for life by the trustees of the settlement; and if there be none, then "by such person and in such manner as the Court, on the application of the testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders."

Guardian by election when an infant is entitled to legacy, &c.

Sometimes guardians by election are appointed when the infant is destitute of a guardian, and is entitled to a legacy, but the trustees of the will have no authority to advance the interest for maintenance, &c., or where the infant is entitled to a distributive share of an intestate's effects, and in both cases the friends of the infant are desirous of avoiding the expense of an application to the Court. The chief end the parties have in view by such an appointment is, that without an application to the Court, there may be some persons recognised by law as capable of taking care of the infant, and directing a proper maintenance and education for him, out of the interest of his property, during infancy. An executor or an administrator might, however, without the direction of the guardians, apply a reasonable part of the interest of the infant's legacy or share, during his infancy, for his maintenance and education; and such payments would be allowed by the Court. For where an executor, *Lee* v. *Brown*, 4 Ves. 369, and consequently an administrator, does, without application, what the Court would have approved, he will not be called to account, and forced to undo it, merely because it was done without application. But the concurrence of the guardian in the payment and maintenance and education is thought to make it much safer. The act of a guardian without authority of the Court, if beneficial to the infant, Lord *Eldon* said, the Court would *perhaps* ultimately have protected; though, had the actual consequence been detrimental to him, that *might* have created some difficulty: *Milner* v. *Harewood*, 18 Ves. 273. The learned Mr. Hargrave appears to have thought, that a guardian in socage is entitled to take into his custody the infant's personal estate, except where by the custom of a particular place it happens to be liable to a different custody: his idea being, that the custody of the infant's person draws after it the custody of every species of property, for which the law has not otherwise provided. Hargr. n. Co. Litt. 88, b. (16). But see Wentworth's Office of Executor, 220, from which it seems, that, in his time, payment of a legacy to the guardian of the *lands* was not a proper payment. And although Mr. Hargrave's opinion is not sanctioned by the modern

Executor may allow an infant maintenance, &c. out of the interest of his legacy.

Rights of guardian in socage to the custody of the infant's personal estate.

practice of the Court, and is opposed by an expression of Lord Chief Justice *Vaughan*, in his Reports, 186, *ante*, p. 802, yet as a guardian by election has the same power and authority as a guardian in socage, there have been instances in which, under the authority of Mr. Hargrave's opinion, executors and administrators have paid infants' legacies and distributed shares to their guardians by election. Sometimes this has been done on an indemnity by the guardians from all actions and claims in consequence of making the payment; and in other instances the money has been invested in the three per cent. Consols, in the names of the executor or administrator and of the guardians, in trust for the infants. However, this is not a prudent course for the executor or administrator to pursue; for the Court of Chancery has compelled an executor to repay a legacy, which he had previously paid to the father, the natural guardian of an infant entitled to it, in order, as the Lord Chancellor said, not to encourage payments to parents and guardians in wrong of infant children: *Dagley* v. *Tolferry*, 1 P. Wms. 285; *Doyley* v. *Tollferry*, 1 Eq. Ca. Abr. 300, pl. 2; *Dawley* v. *Ballfrey*, Gilb. Eq. Ca. 103, *S. C.* See *Campart* v. *Campart*, 3 Bro. C. C. 195. And see *Holloway* v. *Collins*, 1 Chan. Ca. 245, nearly to the same effect. See also *Philips* v. *Paget*, 2 Atk. 80; *Cooper* v. *Thornton*, 3 Bro. C. C. 96; *Whopham* v. *Wingfield*, 4 Ves. 630; *Colham* v. *West*, 1 Beav. 381. And when the infant's money is invested in the names of the executor or administrator and of the guardians, there is a possibility of danger in doing it; for in case the executor should die, and the stock be sold out by the survivor, and misapplied, the infant might then call on the representatives of the administrator for repayment of the money. The direct and safe course for the executor or administrator to pursue in such a case is, to pay the infant's legacy or share, after deducting the duty, into the Bank of England with the privity of the Paymaster General to the account of the infant; or, if more than one, to the account of the respective infants. By the stat. 11 Geo. 4 & 1 Will. 4, c. 65, s. 32, the Court was authorized on the petition of any infant in whose name stock is standing, or if no guardian, by order, in any cause, to direct all or a part of the dividends to be paid to the guardian, or any other person, for the infant's maintenance. See *Re Naish*, 9 L. J. (N. S.) Ch. 252. And the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 42, contains provisions for the management of infants' lands by trustees of settlements, and for the receipt and application of the income of such lands for the maintenance, education, and benefit of the infants. See *infra*, tit. SETTLEMENTS.

Payments of legacies to parents or guardians, not good.

The safe course for an executor or administrator to pursue is, to pay the infant's money into the bank.

Stat. 11 Geo. 4 & 1 Will. 4, c. 65, s. 32.

Where a legacy is small, and the infant has no other provision, the Court will direct the interest to be paid to the father for maintenance, without a reference; *Ex parte Dudley*, 1 Jac. & W. 254, n.; and the same has sometimes been done as to the principal: *Ex parte Green*, 1 Jac. & W. 253. See *Ex parte Swift*, 1 Russ. & M. 575; *Re Allsop*, 1 C. P. Coop. 44; *Clay* v. *Pennington*, 8 Sim. 359; *Allen* v. *Coster*, 1 Beav. 202. It is frequently convenient in giving small legacies to infants to authorize the payment of them to parents or guardians for their

Payment to the father directed, where.

use, in order to avoid the necessity of making any application to the Court, or using other means for the indemnity of the executors. As to legacies to infants, see Rop. Leg. by White, Vol. I. 879.

Guardian's consent to the infant's marriage.

A guardian by election, being a "guardian of the person lawfully appointed," the question arises whether the consent of such a guardian would be a sufficient consent to the marriage of the infant, where there is no father, or any other guardian. A testator appointed his wife sole guardian of his infant children, and bequeathed a legacy to each of his daughters on attaining twenty-one years or marrying with the consent of her "guardian or guardians." After the death of the wife one of the daughters married under twenty-one, without any consent. It was held that the daughter not having complied with the condition was not entitled to the legacy; and that the consent of a guardian appointed by the infant herself would not have satisfied the condition: *Re Brown's Will* (C. A.), 18 Ch. D. 61. The proper course is to apply to the Court on behalf of the infant, praying that a guardian may be appointed for the purpose of giving a legal consent to the marriage: *In re Woolscombe*, 1 Madd. 215.

In *Horner* v. *Liddiard*, Sir *Wm. Scott* construes the words, *a guardian lawfully appointed*, to mean a guardian appointed by the father only. He cites no authority for this construction. See Dr. Croke's report of the case, p. 180. The Marriage Act, 4 Geo. 4, c. 76, ss. 16, 17, authorizes the father, if living, and if dead, the guardian appointed by the Court, and if there be no guardian, the mother, being unmarried, to give consent; and in case of incapacity, unreasonable refusal, &c., empowers the Lord Chancellor, Master of the Rolls, or Vice-Chancellor, upon petition, to decide upon the eligibility of the marriage. See 6 & 7 Will. 4, c. 85, s. 10. Marriage by licence, without consent, is valid, notwithstanding infancy: *Rex* v. *Birmingham*, 2 Man. & Ry. 230; 8 B. & Cr. 29.

Marriage Act, 4 Geo. 4, c. 76.

Court may appoint a guardian, and remove all kinds of guardians, for improper conduct.

Where an infant is destitute of a guardian, the Court has the power of appointing a guardian of his person and estate: Hargr. n. Co. Litt. 88. b. (16); 2 Fonbl. Eq. 226; *De Manneville* v. *De Manneville*, 10 Ves. 52; *Wellesley* v. *Duke of Beaufort*, 2 Bligh, N.S. 124; 1 Dow & Cl. 152. And an appointment of a guardian by the infant will not supersede the duty and authority of the Court, whether the infant has socage lands or not: *Curtis* v. *Rippon*, 4 Mad. 462; *Locker's case*, cit. *Ex parte Watkins*, 2 Ves. sen. 470. An appointment by the infant, therefore, cannot be much relied on. If a guardian appointed by the father die, or refuse to take upon himself the guardianship, or becomes a lunatic, or is otherwise incapacitated to execute the trust reposed in him, the Court may appoint a proper guardian. So, if either a common-law guardian, or a guardian by election, or a testamentary guardian, abuse the trust by doing anything prejudicial either to the person of the infant or his estate, the Court may either totally remove him and appoint another guardian, or else impose such terms on him, by obliging him to give security, &c. as will effectually hinder him from doing anything prejudicial to the infant: Bac. Abr. Guardian (C.); *Goodall*

v. *Harris*, 2 P. Wms. 561; *Duke of Beaufort* v. *Berty*, 1 P. Wms. 704; 1 Wooddes. 461. Where a feme guardian appointed by the Court marries, a reference is made to the master to appoint a new guardian, with liberty for the lady to propose herself: *In re Gornell*, 1 Beav. 347; *Anon.*, 8 Sim. 346. The Court now appoints guardians upon summons without requiring a suit to be instituted (15 & 16 Vict. c. 80, s. 26). See Daniell's Chancery Practice, 6th ed. p. 1113 *et seq.*; Seton, p. 721 *et seq.*

By the Rules of the Supreme Court, 1883, Ord. XVI. r. 16, guardians *ad litem* may be appointed to defend actions on behalf of infants: see also rr. 18, 19, and Ord. LV. r. 27. By Ord. LV. r. 2 (12) applications as to the guardianship and maintenance or advancement of infants are enumerated among matters assigned to the Chancery Division. See also Seton, p. 706 *et seq.*

Guardian of a natural child.

Although a father cannot appoint testamentary or any other guardians to his *natural child* (see *Sleeman* v. *Wilson*, L. R., 13 Eq. 36), yet where he names persons in his will as guardians, the Court will generally appoint those persons guardians: *Ward* v. *St. Paul*, 2 Bro. C. C. 583; *Peckham* v. *Peckham*, ibid.; 2 Cox, 46. And generally an ineffectual appointment of a guardian by a parent will be regarded by the Court: *Hall* v. *Storer*, 1 You. & C., Ex. 556. See also *Whitelock* v. *Finch*, 3 You. & C., Ex. 724. But even while the father is living the Court will prefer the mother to the father of a natural child: *R.* v. *Soper*, 5 T. R. 278; *R.* v. *Moseley*, 5 East, 224 n.; *Ex parte Knee*, 1 B. & P., N. R. 148. But see *Re White*, 10 L. T. 349. And see the recent case of *Reg.* v. *Nash* (C. A.), 10 Q. B. D. 454.

Where a natural child is destitute of a guardian, in order to save the expense of applying to the Court, he sometimes appoints one by election, both before and after fourteen, to enable the guardian to make leases of the infant's lands, and to take care of his property and person. For a bastard being considered, as it were, the first of his family, he cannot by law be heir either to his father or to his mother; consequently he cannot take by descent; in which case only guardianship in socage arises; *ante*, p. 796; and as he has no legal relations, excepting those who spring from his body, no person can claim the right of being his guardian: *Vide* Noy's Maxims, 238, 9th ed.; *Hugh Revel's case*, 1 Harg. Jurid. Arg. 397; *Curtois* v. *Vincent*, Jac. 268.

XII. *AN APPOINTMENT of* GUARDIANS *by several* INFANTS *by one* DEED, *with a subsequent* RATIFICATION *by such of them as afterwards attained Fourteen Years of Age* (*a*).

KNOW ALL MEN BY THESE PRESENTS, that we, the five infant children of ———, late of ———, in the county of ———, deceased, by ——— his wife, also deceased, namely A. B., of ———, in the county of ———, spinster, an infant of the age of twenty years, or thereabouts; C. B., of ———, aforesaid, carpenter, an infant of the age of seventeen years, or thereabouts; E. B., of ———, aforesaid, spinster, an infant of the age of fourteen years, or thereabouts; G. B., of ———, aforesaid, spinster, an infant of the age of twelve years, or thereabouts; and I. B., of ———, aforesaid, spinster, an infant of the age of ten years, or thereabouts, by these presents do, and each of us doth elect, nominate, and appoint [*guardians*], of &c., and the survivors and survivor of them (*b*), guardians and guardian of our persons respectively, and of our real and personal estates respectively, until we shall respectively attain the age of twenty-one years: AND to do, execute, and perform, during our respective minorities,

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(*a*) An infant having lands or hereditaments which do not attract guardianship in socage (*vide ante*, p. 796), may, it seems, before fourteen, elect a guardian of such lands or hereditaments, notwithstanding his parents are living. So after fourteen, when the guardianship in socage terminates, the infant may exercise his right, although he has parents. For although guardianship by nature continues, notwithstanding the determination of guardianship in socage, yet guardianship by nature only attracts the custody of the infant's person; *ante*, p. 797; but it is not common to elect a guardian when there is a lawful parent living, except it be for the purpose of enabling the guardian to make leases. For whether a parent, Litt. s. 123; *Morgan* v. *Morgan*, 1 Atk. 489, or a stranger enter on the lands of an infant, and take the profits, he will be considered, both at law and in equity, as entering as a guardian, and will be accountable as such, until the heir comes to the age of fourteen years: *Hughs* v. *Harrys*, Cro. Car. 229. But for the profits received after the heir comes to the age of fourteen years, the person receiving must in that case be charged as bailiff: F. N. B. 111 B.; Noy's Max. 38; Co. Litt. 89 a; Sullivan's Lect. 128, 129, 2nd ed.; *Dormer* v. *Fortescue*, 3 Atk. 131.

In some cases an infant may elect a guardian, although he has parents.

Whoever takes the profits of an infant's estate, will be accountable as guardian or bailiff.

(*b*) A guardianship devised to three, without saying and to the survivor of them, yet the survivor shall have it: 2 P. Wms. 103; *ante*, p. 801.

XII. Guardian by Several.

all such acts, matters, and things whatsoever for us respectively, and in our behalf respectively, relating to us respectively, and our respective estates as guardians or guardian may or ought to do (*c*). [But such guardianship to cease as to each, any, or either of the guardians who shall go to reside abroad, refuse, or become incapable to act in the said guardianship, or become bankrupt or insolvent (*d*).]

Guardianship to cease as to each guardian who becomes incapable to act, &c.

SUBSEQUENT RATIFICATION.

BE IT REMEMBERED, that on this present day, the above-named G. B., being now of the age of fourteen years, did ratify (*e*) and confirm the election, nomination, and appointment above made.

IN WITNESS, &c.

XIII. *APPOINTMENT of* GUARDIAN *by a Father.*

KNOW ALL MEN BY THESE PRESENTS that I [*father*] of &c., hereby nominate and appoint [*mother*] my wife to be the guardian of my children, from and after my decease, until, being sons, they shall respectively attain the age of twenty-one years, or being daughters, they shall respectively attain that age or marry, and I commit to my said wife the sole custody and tuition of my said children accordingly: PROVIDED ALWAYS, that if my said wife shall die or marry again after my decease and before the youngest of my children, being a son, shall attain twenty-one years of age, or being a daughter, shall attain that age or marry, then, and in either of such cases, I declare that the appointment hereby expressed to be made shall be void, and in lieu thereof I hereby appoint A. B. of &c., such guardian of my children as aforesaid, and commit to him the sole custody and tuition of them accordingly.

IN WITNESS, &c. (*f*).

The appointment of a guardian should be general.

(*c*) Sometimes the appointment of a guardian by an infant authorizes the making of leases, &c.; yet, as appears above, the guardian does not derive his authority from the infant, but from the law, it seems better to omit the enumeration of any particular act which he is to do.

(*d*) The words in brackets will prevent the necessity of having recourse to the Court, in consequence of the guardian's incapacity or refusal to act.

(*e*) *Vide ante*, p. 801.

Stamp, 10*s*.

(*f*) This appointment must be by deed, under stat. 12 Car. 2, c. 24. See *ante*, p. 798. Stamp, 10*s*.

XIV. *APPOINTMENT of a* PROTECTOR *of a* SETTLEMENT *under a Will, in lieu of* ONE *of three* PROTECTORS *appointed by the Will, who* RELINQUISHES *his Office by the same Deed: Variations adapted to the Case of a Protector's relinquishing his Office by a separate Deed, or of a Vacancy happening by Death.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, We [*appointors*], of &c., the protectors of the several estates tail created by the will of [*testator*], dated, &c., and proved, &c., send greeting: WHEREAS (*g*) the said [*retiring protector*] is desirous of relinquishing the office of protector so imposed upon him by the said will of the said [*testator*] deceased: AND WHEREAS the said [*continuing protectors*] are desirous of appointing [*new protector*], to be a protector in the room of the said [*retiring protector*]. NOW KNOW ALL MEN BY THESE PRESENTS, that I [*retiring protector*] hereby absolutely relinquish the office of protector of the said estates tail, so imposed upon me by the said will. AND KNOW YE FURTHER, that we [*continuing protectors*], by virtue and in exercise of the power in that behalf reserved to us by the said will, hereby appoint (*h*) [*new protector*], to be a protector of the

Desire to retire from protectorship.

Desire to appoint new protector.

Retiring protector relinquishes his office.

Appointment of new protector.

(*g*) If the protector has relinquished by a separate deed, say,

"AND WHEREAS the said [*retiring protector*], by deed-poll, under his hand and seal, dated, &c., and duly inrolled in the High Court of Chancery, did absolutely relinquish and retire from the said office of protector so imposed upon him by the said will of the said [*testator*] deceased: AND WHEREAS the said [*continuing protectors*] are desirous," &c. NOW KNOW [*following up the recital immediately by the appointment of the new protector as in the text*].

RELINQUISHMENT BY SEPARATE DEED.

If the former protector has died, say,

"AND WHEREAS the said [*deceased protector*] departed this life in the month of ——— last, and is buried in ———: AND WHEREAS the said [*continuing protectors*] are desirous," &c.

FORMER PROTECTOR DECEASED.

(*h*) See the statute 3 & 4 Will. 4, c. 74, s. 32, which restrains the number of protectors at one time to three. The persons appointed must not be aliens, and they must be *in esse* when they are appointed. The power of appointing new protectors

XIV. Protector.

said estate tail, or respective estates tail, under the said will of the said [*testator*] deceased, in the room of the said [*retiring protector*], and jointly with us; with all such discretionary powers, authorities and privileges, in all respects, as if he the said [*new protector*] had been appointed a protector of the said estate tail or estates tail in and by the said will of the [*testator*] deceased.

In witness, &c. (*k*)

XV. *APPOINTMENT of a* Steward (*l*) *of a Manor.*

Grant.

KNOW ALL MEN by these presents, that I [*lord* (or *lady*)], of &c. (*m*), hereby give and grant unto [*steward*], of

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can only be exercised in case a vacancy occur by death or relinquishment. In case of the *incapacity* of any protector, the Lord Chancellor or Lord Keeper is intrusted with his authority: sect. 33.

If the owner of the prior estate for life, or estate determinable with life, is made one of the protectors, he should be prohibited from acting as protector in case of the office becoming, by the death or retirement of his coadjutors, vested solely in him, or otherwise it would seem he might do. The effect of such a declaration is to constitute the Court protector until the vacancy in the protectorship is supplied under the power.

(*k*) This appointment, and the relinquishment of the office of protector by the retiring protector, if it is made by a separate deed, must be inrolled in Chancery within six months after the execution: stat. 3 & 4 Will. 4, c. 74, s. 32.

A steward appointed by parol, by one solely seised, has the same powers as if appointed by deed.

(*l*) A voluntary appointment of a steward of a manor by a lord or lady, solely seised of the manor, is frequently notified to the steward by word or letter, without any formal appointment being made. For a steward, either of a court baron or of a court leet, Co. Litt. 61 b., may be retained by parol; and this retainer by parol is as effectual in all points until the steward is discharged, as the most effectual institution by patent or deed. A steward thus retained may examine a feme coverte, or take a surrender, either in or out of Court, although there be no special custom to warrant; *Smithson* v. *Cage*, Cro. Jac. 526; or make voluntary admittances, or do any other act incident to the office of a steward, as well as if he had a grant thereof by a patent or deed: Co. Cop. s. 45, Tr. 104; *Harris and Jay*, 4 Rep. 30 a.; *Lady*

To continue after lord's death.

(*m*) If it be wished that the stewardship should continue, notwithstanding the lord's decease, add,

"for me, my heirs and assigns, *have*," &c.

XV. Steward of a Manor.

&c., gentleman, the office of steward of my manor [*or* manors] of ———, in the county of ——— [and of every of them]: AND I appoint the said [*steward*] steward of the said manor [*or* manors, and of every of them], to hold all courts baron and customary courts belonging to the said manor [*or* manors, or any of them], at the usual times the same have been accustomably holden, and at such other times as he the said [*steward*] shall think fit and requisite: To HOLD the said office of steward, and to receive the fees and profits thereto belonging, by the said [*steward*], or his sufficient deputy, during (*n*) my will and pleasure (*o*): And I hereby

Appointment.

Habendum during pleasure.

Holcroft's case, 4 Rep. 30 b.; Hargr. n. Co. Litt. 59 a. (1); Gilb. Ten. 221, 313. But a patent is necessary to the making of stewards of the King's manors: *Harris and Jay*, 4 Rep. 30 a.; Cro. Eliz. 699; Co. Cop. s. 45, Tr. 104; Hargr. n. Co. Litt. 61 b. (1); 5 Gwil. Bac. Abr. 189; *vide* Rev. stat. 1 Anne, c. 1, ss. 5, 8. So in the case of a corporation aggregate, a patent or deed is requisite: Co. Cop. s. 45, Tr. 105. See further, 19 Vin. Abr. 596, *Steward* (F.); Com. Dig. *Copyhold* (R. 5); *Leet* (M. 1). The acts of a steward *de facto*, like those of a lord *de facto*, are valid so far as they are merely ministerial: *Doe* d. *Burgess* v. *Thompson*, 1 Nev. & P. 215; 5 Ad. & El. 532.

But it is otherwise as to the steward of the king, or of an aggregate corporation.

Surrenders may by custom be taken by another person than the steward or the lord, as where S., holding, by patent from the lord, the office of clerk of the castle of F. within the manor, claimed a customary right to take surrenders, concurrently with the steward's right: *Doe* d. *Stilwell* v. *Mellersh*, 1 Nev. & P. 30; 5 Ad. & El. 540.

(*n*) If the stewardship be to continue, notwithstanding the lord's decease, say,

TO CONTINUE AFTER LORD'S DEATH.

"during the will and pleasure of me the said [*lord*], my heirs and assigns."

(*o*) In the case of a solicitor whose stewardship is determined, the Court will exercise a summary jurisdiction to compel him to deliver up the court-rolls and muniments of his employer: *Ex parte Corpus Christi College*, 6 Taunt. 105. See also *Ex parte Grubb*, 5 Taunt. 206; *Cocks* v. *Harman*, 6 East, 405; *Hughes* v. *Mayre*, 3 T. R. 275. Although a solicitor has a lien upon all papers delivered to him in that character, not only for professional business in the matter of the papers, but for all professional business whilst they remain in his hands; yet he has no lien, as solicitor, on papers which he receives as steward: *Chapernown* v. *Scott*, 6 Madd. 93. *Vide infra*, tit. MORTGAGES. As to whether the steward is bound to allow inspection of the rolls, see *Rex* v. *Lucas*, 10 East, 235; *Rogers* v. *Jones*, 5 D. & Ry. 484; *Ex parte Hutt*, 7 Dowl. P. C. 690; *Warrick* v. *Queen's College, Oxford*, L. R., 3 Eq. 683; *Owen* v. *Wynn*, 9 Ch. D. 29.

Discharged steward, a solicitor, compelled by *mandamus* to deliver court-rolls.

XV. Steward of a Manor.

authorize the said [*steward*] from time to time to make and execute any voluntary grants of all or any customary or copyhold lands within the said manor, and to give to the tenants thereof licences to demise, or otherwise, as he the said [*steward*] shall deem expedient: And also to appoint any deputy or deputies for all or any of the purposes aforesaid, with all or any of the powers of the said [*steward*] as such chief steward, and with power to such deputy to appoint any sub-deputy. IN WITNESS whereof, I, the said [*lord*], have hereunto set my hand and seal, the ——— day of ——— 18—(*p*).

Attestation. SIGNED, SEALED AND DELIVERED in the presence of }

XVI. *APPOINTMENT of a* DEPUTY STEWARD.

Recital of steward's appointment.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*steward*], of &c., gentleman, send greeting. WHEREAS (*q*)

FOR LIFE. If for life, say,

"during the life of him the said [*steward*]."

The lord of a manor may, by deed, grant the stewardship of the manor and of the courts thereto belonging for the life of the grantee: Litt. 378; Co. Litt. 233 b.; *Bartlett* v. *Downes*, 3 B. & Cr. 616.

DURING GOOD BEHAVIOUR. If during good behaviour, say,

"during such time as he the said [*steward*] shall well and faithfully perform the duties of his said office."

The stewardship of a court leet cannot be granted for years, but of a court baron may.

Where one made a grant for years of the stewardship of a court leet and court baron, it was held to be void as to the court leet, being a judicial office; but good as to the court baron, where the office was merely ministerial, the suitors being the judges of that court; but the grant appearing afterwards to be for years, determinable upon the death of the lessee, it was held good for both; because there was no danger of its going to executors or administrators: *Howard* v. *Wood*, Sir T. Jones, 126; 2 Lev. 245.

Stamp. (*p*) If the grant or appointment be made by letters patent, deed, or other writing, the stamp duty on it must be charged according to the annual salary, fees, or emoluments, appertaining to the stewardship, as regulated by the stat. 33 & 34 Vict. c. 97, Sched. tit. Admission.

A recital is not requisite. (*q*) It is not requisite that the original appointment should be recited: *Parker* v. *Kett*, 1 Lord Raym. 660; Com. Dig. *Poiar* (C. 4).

XVI. Deputy Steward.

[*lord*], of &c., esquire, by deed-poll under his hand and seal, dated on or about the ——— day of ———, 18—, gave and granted unto me the said [*steward*], the office of steward of his manors of ———, in the county of ———, and every of them: And did thereby appoint me steward of the said manors, and every of them, to keep and hold all courts belonging to the said manors, or any of them, at the usual times the same had been accustomarily holden, and at such other times as I should think fit: To hold the said office of steward, and to receive the fees and profits thereto belonging, by me or my sufficient deputy (*r*), during the will and pleasure of the said [*lord*], NOW KNOW YE, that I the said [*steward*], by virtue of the power and authority given me by the said [*lord*], hereby appoint [*deputy*], of &c., gentleman, my deputy steward of the said manors, and every of them,

Appointment of deputy steward.

(*r*) It seems that a steward cannot appoint a general deputy unless he be authorized so to do, either by the terms of his own appointment, Co. Cop. sect. 46, Tr. 107; Gilb. Ten. 284, 320, or by the special custom of the manor: *Lord Dacre's case*, 1 Leon. 288. But where a deputy may be appointed, the extent of his authority is as great as the steward's own authority, and his office consists in performing the self-same duties that the high steward himself is to perform: Co. Cop. sect. 46, Tr. 107. It was formerly held, that a deputy steward could not admit out of Court, without a particular custom, Co. Cop. *ubi supra*, or an authority from the lord or head steward for that purpose: Bro. Abr. *Court Barron*, pl. 22; *Tenant per Copie*, pl. 26. However, later authorities established, that a deputy steward may do any act which his principal might have done: *Parker* v. *Kett*, 1 Lord Raym. 659; 1 Salk. 95; 12 Mod. 467, *S. C.* A deputy steward cannot make a general deputy; because it implies an assignment of his whole power, which he cannot assign over: 5 Bac. Ab. 208, *Officers* (L). For a deputy being only one who is authorized himself, he cannot delegate that authority; and if a deputy might make a deputy, such second deputy might also do the same; and so *ad infinitum*, which would be highly inconvenient: Lib. Reg. 446. But every steward, or deputy steward, may authorize another to do any special act for him; as to hold a court, to take surrenders, and make grants by copy and admittances: *Lord Dacre's case*, 1 Leon. 288; Gilb. Ten. 284; *Parker* v. *Kett*.

A general or a special deputy steward may be appointed by writing or by parol: Co. Cop. sect. 46, Tr. 107; 1 Leon. 288; 1 Lord Raym. 661. However, the appointment of a deputy for either purpose is most usually made by writing under hand and seal.

An *ad valorem* stamp is required, according to the annual value of the emoluments, &c., *ante*, p. 812, note (*p*).

Authority of steward to appoint a deputy.

Authority of deputy.

A deputy steward may admit out of Court.

A deputy steward cannot make a general deputy.

Every steward or deputy steward, may appoint another to do any special act.

A deputy may be made by word, by writing, or by deed.

Stamp.

XVI. Deputy Steward.

during my will and pleasure, to perform, and execute the said office in my stead in all things as effectually as if I myself were personally present at the doing thereof: He the said [*deputy*], from time to time, whenever he shall be by me required so to do, duly accounting to me for all fines, heriots, and profits of the said courts; and also for all fees, perquisites, rewards, and profits, from the said office arising. In WITNESS whereof, I the said [*steward*] have hereunto set my hand and seal, &c.

XVII. *APPOINTMENT of a* DEPUTY STEWARD *of Manors, with a* REDDENDUM.

Appointment of a deputy steward.

KNOW ALL MEN BY THESE PRESENTS, That I, [*steward*], of &c., gentleman, steward of the manors of ——— and ———, in the county of ———, hereby appoint [*deputy*], of &c., gentleman, my deputy or under-steward of the said manors, to perform and execute the said office in my stead, in all things, as effectually as I could do myself if I were personally present, and performed and executed the same: To

Habendum for joint lives of steward and deputy; and to take all fees, &c.

HOLD and exercise the said office of deputy-steward of me the said [*steward*], during the term of our joint natural lives (*s*) (or during my pleasure); AND TO TAKE and have, during the said term, for performing and executing the said office, all fees, wages, rewards, and profits, to the same office belonging:

Reddendum, a yearly sum to steward.

YIELDING AND PAYING (*t*) nevertheless therefor unto me the said [*steward*], yearly during the said term, the clear yearly sum of £———, on the ——— day of ——— in every year.

IN WITNESS &c.

(*s*) If the steward be not steward for life, of course he cannot appoint for the joint lives: *Vide ante*, p. 812.

(*t*) Frequently there is also a bond for this purpose.

XVIII. *APPOINTMENT of a* DEPUTY STEWARD, *for the* SPECIAL *Purpose of admitting an Heir, and taking a Surrender by way of Mortgage; or for taking a Surrender from Husband and Wife to a Purchaser.*

KNOW ALL MEN BY THESE PRESENTS, That I [*steward*], of &c., steward [by patent] of the manor of ———, in the county of ———, hereby appoint [*deputy*], of &c., my deputy steward (*u*), to hold a special court for the said manor, on the ——— day of ——— next, or on some day before the ——— day of ——— next, and then and there as my said deputy steward, to admit [*heir*] (eldest son and heir at law of [*ancestor*], deceased, late a copyhold or customary tenant of the said manor), tenant to all and singular the premises which the said [*ancestor*] held of the said manor, and of which he died seised, that is to say; to one messuage, &c., within the manor aforesaid: To hold to him the said [*heir*], his heirs and assigns, at the will of the lord, according to the custom of the said manor. AND immediately after his said admission, to accept and take from the said [*heir*] a surrender by the rod of all and singular the said premises, To the use of [*mortgagee*], of &c., his heirs and assigns; But with a condition that the said surrender shall be void on payment, by the said [*heir*], his heirs, executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of [*mortgage-money*], and interest for same, after the rate of five pounds per centum per annum, on the ——— day of ——— next ensuing: AND FURTHER, to perform and execute the said office in my stead, as far as I have here constituted and deputed him the said [*deputy*] my deputy as aforesaid, in all things, as fully and effectually as I could do

Appointment of a deputy steward,

to admit heir,

and take mortgage surrender.

General authority.

(*u*) If it be to take a surrender, either in or out of Court, say, "to take one or more surrender or surrenders, according to the custom of the said manor, of and from [*vendor*], of &c., and [*wife*], his wife, she being first solely examined touching her consent thereto, after the usual manner of surrenders in the like cases, of All that messuage, &c. To the use of [*purchaser*], of &c., his heirs and assigns, according to the custom of the said manor. AND FURTHER to perform and execute," &c. *ut supra.*

TO TAKE SURRENDER FROM HUSBAND AND WIFE.

XVIII. Special Deputy Steward.

myself if I were personally present, and performed and executed the same myself: The said [*deputy*] duly accounting to me for all heriots, fines, fees, and perquisites, that shall be due and received by him for the purposes aforesaid.

Deputy to pay fines, &c. to steward.

In witness, &c. (*x*).

XIX. *GENERAL APPOINTMENT of a Solicitor to the several Offices of* Steward, Gamekeeper, Receiver, *and* Manager, *of large Estates; with Authority to sell Timber, to contract for granting Leases and Renewals, and to appoint Deputy Stewards, Bailiffs, Agents, &c.; the Moneys the Steward shall receive to be applied in paying himself a Poundage, Law Charges as Solicitor of the Trustees, and for Surveying, &c.; in paying Salaries, &c. to Deputy Stewards, &c.; in paying Annuities charged on the Estate; in paying Expenses of Repairs; and to account for and pay the Residue to the Trustees.*

THIS INDENTURE, made the ——— day of ———,

Parties.

Between [*owner*], of &c., of the one part, and [*steward*] of &c., of the other part,

First Testatum.

WITNESSETH, and the parties hereto mutually covenant and agree as follows:—

Appointment of steward;

1. The said [*owner*] hereby constitutes and appoints the said [*steward*] to be the steward of all those the said several manors or lordships of &c.:

to hold all manner of courts;

And also to hold all and singular the [courts leet, courts baron, courts of view of frankpledge, customary, and other] courts within the said manors, or any of them:

and to demand fee of office.

And to demand, sue for, and recover, have, receive, and take to and for the proper use and benefit of him the said [*steward*], all manner of fees, perquisites, profits, wages, rewards, and advantages whatsoever, to the office of steward of the said manors belonging or appertaining, and which have heretofore been accustomed to be had and received by the steward or stewards thereof respectively, to and for their respective use and benefit, for or by reason of the office of steward.

Stamp.

(*x*) Stamp, *ad valorem* on annual amount of emoluments. See *ante*, p. 812, note (*p*).

XIX. Steward, Gamekeeper, Receiver, and Manager.

2. The said [*owner*] hereby also appoints the said [*steward*] henceforth to be the gamekeeper for him of the several manors or lordships hereinbefore named, with full power, licence, and authority to preserve or kill (*y*) the game within the limits of the said manors, or any of them, for the use of the said [*owner*]: AND ALSO to seize and take, for the use of the said [*owner*], all such dogs, nets, and other engines and instruments for the killing or taking of game as shall be used within the said limits by any person not authorized to kill game for want of a game certificate: And generally to execute and perform all such matters and things, for the preservation of the game within the said manors, as he the said [*owner*] might or could do if personally present.

Appointment of gamekeeper,

to kill game,

and seize engines;

and to do all such things for preserving the game as the person appointing could.

3. The said [*owner*] hereby also constitutes and appoints the said [*steward*] his receiver, agent, and attorney, in the name of him the said [*owner*], to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, of and from the present and future tenants and occupiers of the said manors, lands, hereditaments, and premises; and also of and from all other persons liable to pay the same, ALL the rents, issues, fines, and other profits, that are now in arrear and unpaid, and which shall hereafter grow due and be in arrear for or in respect of the same manors, lands, hereditaments, and premises, or any of them, or any part thereof: AND upon non-payment of the same, or any part thereof respectively, to enter and distrain upon the hereditaments liable thereto; and the distress and distresses then and there found, to take, impound, detain and keep, or otherwise to sell and dispose thereof according to law. AND ALSO to commence and prosecute any actions or other proceedings which the said [*steward*] may think necessary or advisable, for the recovery of the said rents, issues, fines, and profits, and for recovering, receiving, obtaining, and getting possession of the said manors, lands, and hereditaments, or any of them, or any fines, heriots, rents, sum or sums of money, duties, or services in respect thereof: And the same actions or proceedings, to prosecute, or to discontinue, or otherwise to act therein as he the said [*steward*] shall think proper or be advised: AND upon receipt of the same rents, arrears of rents, issues, and

Appointment of receiver of

rents, fines, heriots, &c.

On non-payment, to distrain;

to bring actions, &c.;

to give receipts for rents, &c.

(*y*) *Vide ante*, p. 787.

XIX. Steward, Gamekeeper, Receiver, and Manager.

profits, or any part thereof, for him the said [*owner*] to give effectual receipts and discharges for the same.

4. The said [*steward*] may and shall from time to time, as he shall think proper, sell, and enter into contracts for sale of any timber and underwood, growing and being upon any of the manors, lands, and premises which he the said [*owner*] is, under or by virtue of the said will, authorized and empowered to fell and cut down: And also to sign and execute effectual receipts and discharges for all sums of money which may become payable for and in respect of the sale of any such timber: And also to empower the respective purchasers of all or any such timber and underwood by themselves or their agents and workmen, to enter on the manors, lands, and premises whereon the same shall be growing, and with or without horses, carts, and carriages to carry away the same: And to make sawpits and charcoal pits, and to do all such other acts as shall be necessary for converting, ordering, and managing the said timber and other trees on such convenient and proper places on the manors, lands, and premises whereon the same shall be growing or standing, as shall be from time to time assigned and set out by the said [*steward*].

To sell timber;

to give receipts for purchase-money of timber;

to empower purchasers to carry away timber,

and to make sawpits, &c.

5. The said [*steward*] may and shall from time to time, in the name of him the said [*owner*], enter into and upon and inspect and survey all and every the said manors, lands, hereditaments, and premises at his free will and pleasure; and view, search, and see the state and condition and defaults and wants of repair of the same, and of the buildings and the hedges and ditches thereof, and of want of cultivation of all and every part and parts of the same lands: And repair and give orders, and enter into any contract for employing any person or persons in repairing the same; insure and keep insured against loss or damage by fire any buildings or any effects or property of an insurable nature upon the hereditaments aforesaid, by effecting in the name of the said owner such policy or policies for such sum or sums, and under such premium or premiums as the said [*steward*] shall think fit: And also, for and in the name of the said [*owner*], and as his act and deed, from time to time, enter into, and execute any contract or contracts for any lease or leases, or for the renewal of any existing lease or leases, of all or any of the said lands and hereditaments, for such fines and under such rents, for such terms and upon

To inspect the estates, and order repairs;

to contract for granting leases, and renewals.

such conditions, as shall be conformable to the powers of leasing hereinbefore recited, or any other power vested in the said [*owner*] in that behalf: And generally, inspect, manage, oversee, and superintend all and singular the said manors, lands, hereditaments, and premises: And do any act, matter, or thing for the improving and supporting the same and the income thereof, and the interest of the several persons entitled thereto in possession and remainder in every particular, in the most beneficial manner and to the best advantage, and as the said [*steward*] shall, according to his uncontrolled discretion, think proper.

Generally to inspect, improve, &c. the estates.

6. The said [*owner*] hereby gives full power and authority unto the said [*steward*], from time to time, as he shall think proper, to appoint any person or persons to be his deputy steward or stewards of all or any of the manors and hereditaments aforesaid, and also to be his deputy receiver or receivers, bailiff or bailiffs, agent or agents, surveyor or surveyors, attorney or attornies, for recovering or receiving the rents, issues, and profits aforesaid, or any of them, or any part thereof, and for making, executing, and completing any such contract or contracts for sale of timber, and granting leases as aforesaid, and for surveying and repairing and managing and improving the hereditaments aforesaid; and also to act in all and singular the premises in the same manner as he the said [*steward*] is hereby empowered to act therein: And also from time to time to change and remove any such deputy stewards, bailiffs, receivers, agents, surveyors, or attornies, and to appoint any others in his or their stead, when and so often as to him the said [*steward*] shall seem meet: And generally, for him the said [*steward*] to do, execute, and perform any other act, deed, matter, or thing whatsoever relating to all or any of the manors and hereditaments aforesaid, as fully and effectually, to all intents and purposes whatsoever, as the said [*owner*] might or could do if personally present: And the said [*owner*] hereby agrees to ratify and confirm all and whatsoever the said [*steward*] shall lawfully do or cause to be done in or about the premises.

Power to appoint deputy stewards, receivers, bailiffs, agents, surveyors, or attornies;

and to remove them, and appoint others.

General power to steward.

Ratification of his acts.

7. The said [*owner*] hereby authorizes and directs the said [*steward*] to apply and dispose of, and account for all and singular the moneys which shall come to his hands by virtue of these presents, and of the powers and authorities hereby

Authority to steward to apply the moneys,

XIX. **Steward, Gamekeeper, Receiver, and Manager.**

vested in him as aforesaid (save and except the fees and perquisites of office, as steward of the manors aforesaid) in manner following, that is to say: in the first place, in payment from time to time to himself, the said [*steward*] of sixpence in the pound, upon and out of all moneys which shall come to his hands, or be actually received by him, for or on account of the rents, arrears of rent, sale of timber, and other the sums which he is empowered and authorized to collect and receive, by virtue of this present indenture (which sum of sixpence in the pound is to be the consideration and recompense for receiving the rents and moneys aforesaid, and keeping, settling, and arranging the accounts relating thereto): And in the next place, in payment of bills for law charges, fees, and disbursements (not including travelling expenses or journeys), which shall become due to him the said [*steward*], as the solicitor, agent, or attorney of the said [*owner*] respectively, in prosecuting or defending any action or actions, suit or suits, relating to the estates, rents and moneys aforesaid, and the surveying, mapping, and planning, managing, improving, and superintending the same estates, and the execution of the several powers and authorities vested in him the said [*steward*], exclusive of receiving such rents and moneys, and keeping the accounts relating thereto as aforesaid: And in the next place, in payment of salaries, wages and fees, which shall from time to time become due and owing to the several under and deputy [*stewards*], receivers, bailiffs, surveyors, agents, and other persons, which he the said [*steward*] shall think proper to employ for the purposes aforesaid: And in the next place, in the paying and discharging all and singular the annuities or yearly rentcharges, which now are or shall continue charged upon all or any of the manors and hereditaments aforesaid, as the same shall, from time to time, become due and payable; And also in payment, from time to time, of the expenses to be incurred on account of the repairs which shall be made upon any of the hereditaments aforesaid, which the respective tenants thereof shall not be liable to pay: And also of all premiums of all insurances against loss or damage by fire which may be effected by him of any buildings, effects or property upon the same hereditaments: And in the next place, in payment of all fines, fees, and charges, which shall become due to the landlords for the time being of any of the

in paying himself a poundage;

in paying himself law charges, as attorney of owner,

and for surveying, &c.;

in paying salaries, &c. to deputy stewards, &c.;

in paying annuities charged on the estates;

in paying expenses of repairs, insurance, &c.;

said leasehold premises, for obtaining renewals thereof: And from and after the payment of the said several annuities and other sums of money, In trust from time to time, to answer, account for, and pay the balance remaining in the hands of the said [*steward*], unto the said [*owner*], his executors, administrators or assigns, or as he or they shall from time to time by writing under his or their hand or hands direct.

to account for and pay the residue to owner.

8. The said [*steward*] will and shall diligently and faithfully, to the utmost of his power, serve the said [*owner*] as such his steward, gamekeeper, receiver or agent, manager and superintendent as aforesaid, and take upon himself the care, conduct and management of the same, and will follow and perform the orders and direction of the said owner which shall, by letters or otherwise, from time to time be forwarded or communicated to him concerning the hereditaments aforesaid.

Steward to perform his duties faithfully,

9. The said [*steward*] will and shall, at the costs of the said [*owner*], provide and keep in good order books of account concerning the rents, profits, expenditure and outgoings of, upon or on account of the hereditaments aforesaid; and will and shall from time to time, upon every request of the said [*owner*], produce to him all such books of account as aforesaid, at such time and place as the said [*owner*] shall direct; and will and shall once in every year, or oftener if the said [*owner*] shall so direct in writing, transmit and send to the said [*owner*] a true and correct statement in writing of all receipts and expenditure of, upon or on account of the hereditaments aforesaid, in such manner and form, and with such particulars, as the said [*owner*] may from time to time direct; And will and shall also from time to time by letter inform the said [*owner*] of all such acts and occurrences wherewith it shall be proper or expedient that the said [*owner*] should be acquainted.

and to keep proper books of account.

10. If the said [*steward*] shall be adjudicated bankrupt, or enter into a composition with his creditors, or be guilty of any gross default or misconduct in any of the offices hereby given to him, or by reason of illness or any other cause be incapacitated from acting therein, then immediately upon the happening of any such event all the appointments, powers and authorities, privileges and emoluments hereby made and conferred respectively shall absolutely cease and determine; but in any other case, if the said [*owner*] shall be desirous of removing the said steward from the said offices, or any of

Determination of appointment.

XIX. Steward, Gamekeeper, Receiver, and Manager.

them, it shall be lawful for him so to do upon giving six previous calendar months' notice in writing of such his desire, to be addressed to the said [*steward*] at ———, and upon the expiration of such notice, the office or offices from which the said [*owner*] shall, as stated in such notice, desire to remove the said [*steward*], and all powers and authorities incident thereto respectively, shall absolutely cease and determine; and if the said [*steward*] shall at any time desire to resign the offices hereby given to him, it shall be lawful for him so to do upon giving six calendar months' notice in writing of such his desire to the said [*owner*], to be addressed to him at ——— Hall aforesaid, or such other place as the said [*owner*] may from time to time in writing direct. And upon any such determination of the said offices as aforesaid, a final settlement and winding-up of the accounts of the receipts and expenditure of, upon or on account of the hereditaments aforesaid shall be forthwith made and taken, and the said [*steward*] will give and deliver up the books of account aforesaid undefaced and unobliterated to the said [*owner*], or to such other person or persons as he shall direct, unless prevented by fire or other inevitable accident.

Arbitration clause.

11. If at any time the said [*owner*] shall object to the yearly statements of receipts and expenditure to be rendered and forwarded to him in manner aforesaid, or if any dispute or difference shall at any time arise between the said [*owner*] and the said [*steward*] on the other part, for or on account of any matter or thing herein contained, which shall not within one calendar month after the same shall have arisen be fully decided between the parties themselves, Then, and in every such case, the matter of every such account, dispute or difference, shall be referred to the hearing of two indifferent persons, one to be chosen by the said [*owner*] and the other by the said [*steward*] and, if need be, of a third person, to be chosen by the referees aforesaid before proceeding to the reference as their umpire; and the award and determination of the said referees, if they shall agree, or otherwise of their umpire in the matters referred to them or him, as the case may be, shall be binding and conclusive (*a*).

In witness, &c.

(*a*) An appointment of this nature is not unfrequently accompanied by a bond entered into by the steward, and one

XIX. Steward, Gamekeeper, Receiver, and Manager.

or more sureties for the faithful observance of the duties of the office.

This appointment is liable to an *ad valorem* stamp, according to the annual value of the salary, fines or emoluments appertaining to the office: stat. 33 & 34 Vict. c. 97, sched. tit. ADMISSION.

Stamp.

NOTE.—For APPOINTMENTS OF NEW TRUSTEES, see Vol. II., title APPOINTMENT OF TRUSTEES.

For TESTAMENTARY APPOINTMENTS, see title WILLS.

For other APPOINTMENTS, see titles MORTGAGES, PURCHASES, and SETTLEMENTS.

MIDDLE
TEMPLE

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